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IN THE

Supreme Court of the United States

October Term, 1959

No. 305

HENRY TEITELBAUM,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner Henry Teitelbaum prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in the above entitled case on June 15, 1959.

Opinion Below

The opinion of the Court of Appeals in this case has not yet been reported. This opinion is set forth as an Appendix hereto, *infra*.

Jurisdiction

The judgment of the Court of Appeals was entered on June 15, 1959. On July 2, 1959, Mr. Justice William J. Brennan, Jr., granted an order extending the time of all petitioners in this case to file their respective petitions for writs of certiorari to and including August 14, 1959. The jurisdiction of this Court is invoked under Title 28, United States Code, Section 1254(1).

Questions Presented

The questions presented in this case relate to the following:

1. Whether it was proper in this case to hold a mass conspiracy trial of 19 defendants, on a single count indictment naming 46 defendants and 16 co-conspirators not named as defendants, where the proof tendered showed, at best, many separate conspiracies involving unrelated defendants or groups of defendants, at widely separated periods of time, and which thus resulted in a material and prejudicial variance between the indictment and the proof.

2. Whether there was sufficient credible evidence to sustain the jury's verdict as to petitioner Teitelbaum's purported participation in the conspiracy charged in the indictment, or in any criminal conspiracy.

3. Whether the district court erred in excluding from evidence, as defense exhibits, the certified transcript of the Navy general court-martial of the government witness Ewing, which materially contradicted Ewing's trial testi-

mony and affected his credibility and worthiness of belief, and the records of the New York State Bureau of Motor Vehicles, which contradicted Ewing's claim of legitimate employment.

4. Whether the redirect examination of the government witness Ewing was improper and prejudicial.

5. Whether the district court erred in permitting the United States Attorney to state in open court, but not as a sworn witness, what, if anything, took place before the grand jury and the grand jury "practice" of his office; and whether the district court further aggravated the error by then instructing the trial jury concerning the functions of a grand jury and the quantum of proof necessary before a grand jury to return an indictment.

6. Whether the prosecutor's summation was so grossly unfair and improper as to deprive the defendants of a fair trial, and whether certain improper statements therein were deliberately stated and were calculated to mislead the jury; and whether the failure of the district court to take prompt action to rebuke the prosecutor for such misconduct further deprived the defendants of a fair trial.

7. Whether the Court of Appeals erred in finding that no prejudice resulted to the defendants while holding that the prosecutor's summation constituted error when he stated that only one of the defendants "had the courage to take the stand" as a witness in his own defense.

8. Whether all the defendants on trial, including petitioner Teitelbaum, were entitled, as a matter of law, and

after the district court had been so requested in writing, to have the jury charged that they were to consider the uncorroborated testimony of an accomplice and co-conspirator with great caution and care, and that they were not to convict a defendant on such uncorroborated testimony unless they believed it beyond all reasonable doubt; and whether the failure and refusal of the district court to charge the jury in this way was prejudicial error as a matter of law.

9. Whether under the circumstances of this case, where only one government witness (Ewing), an accomplice and co-conspirator named in the indictment, who was not corroborated in any respect, and who gave the only testimony against petitioner Teitelbaum and others on trial with him, the errors complained of were prejudicial as a matter of law, requiring that this conviction be reversed.

Petitioner Henry Teitelbaum respectfully incorporates herein by reference, on his behalf, all points, arguments and contentions made and raised in the various petitions for writs of certiorari filed by all other petitioners in this case, as though set forth at length herein, without any further restatement of these matters.

Statute Involved

The statute involved in this case is Title 18, United States Code, Section 371, which reads as follows:

> *"Conspiracy to commit offense or to defraud United States.*
>
> If two or more persons conspire either to commit any offense against the United States, or to defraud

the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both."

STATEMENT OF THE CASE

The Indictment

The indictment in this case, containing only one count, named 46 persons as defendants and 16 others as co-conspirators not named as defendants. Essentially this indictment charged that from on or about January 1, 1950 and continuously thereafter to and including May 1, 1956, these defendants and co-conspirators conspired to violate the provisions of Title 18, United States Code, Section 212 (bribery of Customs Officers) and Title 21, United States Code, Sections 173 and 174 (Harrison Narcotic Act). It was alleged that these defendants and co-conspirators in a single continuing conspiracy conspired to corrupt certain Customs officers and to import and distribute throughout the United States large amounts of the illicit narcotic drugs. 30 overt acts were alleged as having been committed in furtherance of the conspiracy, with petitioner Teitelbaum being named in Overt Acts Nos. 20 and 23.

The Record

The record in this case before the Court of Appeals consisted of the complete typewritten record of the trial in the district court. This record exceeded 5000 typewritten pages, together with the exhibits received in evidence during the

trial. There was submitted to the Court of Appeals a consolidated printed appendix on behalf of all appellants in that court, as well as an appendix submitted on behalf of the government. Said printed appendices exceeded 2500 printed pages. The complete typewritten record and exhibits of the district court have been certified and are submitted to this Court for use in connection with this case, and 9 copies of the printed appendices have also been filed with this Court for like use.

The Facts

The facts in this case as they relate to petitioner Teitelbaum will be set forth in detail in this petition. However, petitioner Teitelbaum respectfully prays that this Court consider the various statements of fact contained in the other petitions filed in this case so that the Court may have before it a complete statement of all the facts. In this way this Court will be able to evaluate the complete facts in proper perspective, and thus be able to consider properly the relatively minor role played herein by petitioner Teitelbaum, as related by the single witness called by the government to testify against him, the co-conspirator James Ewing.

Another preliminary point deserves mention here. Ewing's testimony was replete with the expression

"Vellucci told me . . . "

by which he was able to relate in much detail the facts of conversations that he had with Anthony Vellucci, another co-conspirator not named as a defendant, and who was not called as a government witness. By this technique much

narration of past events, background and hearsay was presented to the jury, over the objection of all defense counsel. It is to be noted also that these conversations between Ewing and Vellucci were not had for the purpose of inducing or persuading Ewing to become part of or a member of the alleged criminal conspiracy, for by Ewing's own admission he was already a participant therein as a large purchaser of narcotics drugs from Vellucci.

The facts in this case disclose through the testimony of Jean Pierre Lafitte, a government informer witness, a purported plot to smuggle into and distribute narcotics throughout the United States during the years 1949-1952, although Lafitte's testimony covered only the period from July 29, 1952 until December 1952 (121a, 161a).[1] Thereafter between December 1952 and December 1953 there was no criminal activity on the part of any of the participants in the earlier period, including those on trial. Then from December 1953 through March 4, 1954 there was some activity on the part of Saul Gelb (a defendant who pleaded guilty) and Nathan Behrman (one of the petitioners in this case in this Court), according to Ewing's testimony, in that Vellucci "told me" that he was going to a different source and do business (458a); and that he had made a connection with Behrman and Gelb. Ewing met Gelb and Behrman through Vellucci. On March 5, 1954, Gelb, who had been under surveillance by government narcotics agents for several months, was arrested by these agents and large quantities of narcotics were found in his apartment.

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[1] All numbers in parenthesis refer to pages in Appellants' Appendix in the Court of Appeals, unless otherwise indicated.

Following Gelb's arrest, sometime in March or April 1954, Ewing testified that he and Vellucci went to the Paddock Bar at 50th Street and Broadway, New York City, where they met Behrman (480a). The next day Vellucci "told" Ewing that they were to meet at the Paddock Bar at 7:00 o'clock that evening for the purpose of making a loan of $50,000 for a shipment of heroin that was arriving (482a). That evening they went to this bar where they met two men, one of whom was the defendant Harry Stromberg (483a). Behrman, Vellucci and Stromberg had a conversation in which Ewing did not participate (484a).

Ewing then testified that two days later he and Vellucci returned to the Paddock Bar where they met Behrman, Stromberg and Teitelbaum, the latter whom he was meeting for the first time (486a). In the transaction which ensued Teitelbaum did not participate, but rather he stood at the bar with Ewing about 8 or 10 feet away from the others seated at the table. Ewing then testified to 9 other occasions between about April 1954 and July 1955 when he met Teitelbaum, generally in the company of Stromberg, and always while Ewing was with Vellucci. At none of these meetings did Teitelbaum participate in any conversations or transactions, except for the time Teitelbaum alone met Ewing and Vellucci at the Steak Joint Restaurant in Greenwich Village.

The circumstances of this meeting were that in June 1955, according to Ewing, he and Vellucci met Stromberg in the Paddock Bar, and that Teitelbaum was also present. At this meeting Vellucci gave Stromberg money, stating that he had not finished his collections, but that he would have it for him the next day (548a-549a). Stromberg then

said he could not meet him the following day, but that he would have "Heinzie" (meaning Teitelbaum) meet him. An appointment was made for 6 o'clock the next evening at the Steak Joint.

The next evening, according to Ewing, he and Vellucci met Teitelbaum at the Steak Joint, where they had a drink at the bar; that Teitelbaum stated to Vellucci that he must be unloading lots of drugs, to which Vellucci replied, "Yes, I am, but at the same time I am making you fellows rich also." Ewing then said he handed $7,000 back to Vellucci, which he had been carrying for him, and Vellucci gave all the money ($15,000) to Teitelbaum (554a). Except for this purported transaction there was no proof of any kind that Teitelbaum knowingly participated in any transactions so as to become a member or participant in the criminal conspiracy charged in this indictment.

On cross-examination as to Teitlebaum, Ewing testified that when he testified before the grand jury in Detroit on January 23 or 24, 1957, he did not mention Teitelbaum's name, nor the name of "Heinzie", by which he said he knew him; nor did he mention "Heinzie" in statements given by him to government agents on March 18, 1956 and in April 1956 in Detroit (804a). The first time Ewing learned Teitelbaum's name was when he saw his picture once in 1956. He then saw it when he testified before the grand jury in New York in June 1957 (805a-806a). He saw the picture at times when Agent John T. Cusack and Mr. Goldschine, a Justice Department lawyer, showed it to him.

Ewing testified that at the times he saw Teitelbaum it was always on weekdays in the evenings, Monday through Friday, and never on weekends (812a).

With respect to Ewing's direct testimony that at the meeting with Teitelbaum in the Steak Joint Restaurant he had $7,000 he was carrying for Vellucci, to which Vellucci added $8,000 from his own pocket, all of which was turned over to Teitelbaum, the government conceded that nowhere in his grand jury testimony either in Detroit or New York, did Ewing make any mention of the money he carried, although Ewing tried to argue and insist that he did mention the fact and the amount before the grand jury (818a-819a).

On redirect examination, with respect to Teitelbaum, Ewing was asked, over objection, "Were you asked before the grand jury to give all the testimony that you could give as to every meeting which you had with Heinzie?", to which he responded, "No" (882a).

By way of defense Teitelbaum produced his employment records for the period involved in this case. Teitelbaum was employed by the Residence Garage Corporation, at No. 2 Fifth Avenue, New York City as a night foreman since 1953. His working hours were from 5 P.M. to 3 A.M., six days per week. The employment records showed steady employment all through the years 1954-1955, with Teitelbaum taking a vacation at the end of August, 1954. Until February 1955 Teitelbaum worked 60 hours per week, when the work week was reduced to 55 hours, and then in June, 1955 the work week was further reduced to 50 hours. He took no vacation in 1955, having requested his 1955 vacation in 1954 and taken it at the end of August 1954 (1340a-1344a, 1356a-1359a).

Bernard Minns, a fellow employee of Teitelbaum testified that he had been working steadily with him since 1953,

and that his hours of employment were the same as Teitelbaum's, 6 P.M. to 3 A.M., although Teitelbaum came in earlier than he did. He testified that Teitelbaum worked steadily with him, never leaving the place while on the job, and that he worked all the days scheduled. He testified that Teitelbaum's day off was Thursday, until the work week was reduced to five days on June 5, 1955 (1359a), when his days off were Thursday and Friday (1344a-1349a).

The bookkeeping records of Teitelbaum's employer verified his work record, especially his regular attendance at his work and thus negatived Teitelbaum's ability to be at the places testified to by Ewing at the times stated (1356a-1359a).

The foregoing constitutes in substance all of the proof in this case relating to petitioner Teitelbaum. At no point was any connection made or established between Teitelbaum and any of the defendants and co-conspirators named in the earlier period, as to which Lafitte testified, and except for Ewing's testimony about meeting Vellucci, Ewing, Behrman and Stromberg, Teitelbaum is not shown to have been connected in any way with any of the other persons named in this indictment. The evidence against Teitelbaum, if believable, was less strong and persuasive even than the evidence adduced against the Customs officers charged in this indictment, Herman Samnick, Benjamin Danis and Saul Snyder; and as to them the Court of Appeals held the evidence to be legally insufficient to sustain the verdict, directing that their convictions be reversed and the indictment dismissed.

During the course of Ewing's direct examination, in testifying about his previous criminal record, Ewing stated he had been convicted by a Navy general court-martial for being AWOL (453a). On cross-examination, by Stromberg's trial counsel, Ewing admitted that he had been convicted for desertion and bad conduct, the bad conduct being fighting. Then Ewing was asked on cross-examination whether he had been court-martialed for scandalous conduct and he said he did not recall (638a). Thereupon, Stromberg's counsel offered and there was received into evidence Defendants' Exhibit G, consisting of a 3 page certified record of conviction for desertion during time of war for a period of 537 days and scandalous conduct tending to the destruction of good morals in that Ewing wilfully and knowingly took the penis of another man in his mouth while both were in the brig.

With the court's permission, counsel for the defendant Stromberg began reading Ewing's record of conviction to the jury (639a). Ewing at first denied that he was the person to whom the record of conviction related because of the initial "N" between his first and last names, but when it developed that the letter "N" meant "no middle initial," Ewing admitted that the conviction record related to him (641a). When counsel for the defendant Stromberg read to the jury the charges of which Ewing was convicted, Ewing denied that he had been convicted of scandalous conduct and stated that this was the first time he had heard of any such thing (641a). When asked if he had seen a Navy doctor after his conviction and explained his condition to him, Ewing again stated under oath that he did not commit the scandalous act (641a). When asked by counsel

if he denied he was convicted, Ewing stated that he was convicted but that he didn't do it. He said he didn't have a regular trial and that the whole trial took only five minutes (642a). He stated that no witnesses appeared against him at his court-martial and that he did not meet any man at the "head" with whom he engaged *in fellatio* (642a-644a).

In the face of these denials under oath, counsel for the defendant Stromberg offered into evidence a certified copy of the entire court-martial proceeding, including the testimony of the witnesses who testified against Ewing. The court sustained a government objection of this offer and counsel for the defendant Stromberg excepted.

Ewing also testified on cross-examination to questions put by Behrman's trial counsel, that he was working as a salesman of automobiles for a firm known as Linden Motors, on Linden Boulevard in Jamaica, Long Island, and that he had held this job since May 1957 (783a). Among the witnesses called by Teitelbaum to refute this claim of legitimate employment by Ewing were the owners of the only automobile businesses bearing any names similar to "Linden Motors" located at Linden Boulevard, and none of these people ever employed or heard of Ewing (1871a-1874a). The defendants then attempted to introduce into evidence records of the New York State Bureau of Motor Vehicles to prove that during the year 1957 there was no "Linden Motors" registered with this bureau. The government's objection to this line of proof was sustained (1351a-1353a).

The Conduct of the Trial

In a mass trial of 19 defendants on a single count of conspiracy only, in which 46 defendants and 16 co-conspirators are named in the indictment, the conduct of the trial is likely to be a great task to court and counsel alike. In such a situation the position of a lone defendant is likely to be submerged in the mass of proof brought out against other defendants on trial as to whom more proof is available. All such evidence received as against particular defendants is taken "subject to connection" with respect to all others, until the jury "finds" a criminal conspiracy does exist, then it is available for use in proving the case against all, under the concept of "partnership in crime". It was to this problem that Mr. Justice Jackson addressed himself in his now famous concurring opinion in *Krulewitch* v. *United States*, 336 U. S. 440, 453-454:

> "The trial of a conspiracy charge doubtless imposes a heavy burden on the prosecution, but it is an especially difficult situation for the defendant. The hazard from loose application of rules of evidence is aggravated where the Government institutes mass trials. Moreover, in federal practice there is no rule preventing conviction on uncorroborated testimony of accomplices, as there are in many jurisdictions, and the most comfort a defendant can expect is that the court can be induced to follow the 'better practice' and caution the jury against 'too much reliance upon the testimony of accomplices.' *Caminetti* v. *United States*, 242 U. S. 470, 495.[2]

[2] The defendants in the Court of Appeals and petitioner Teitelbaum in this petition contend that the charge of the district court with respect to "accomplice testimony", a critical point in this case, was too brief for adequate instruction to the jury and nowhere in the charge was the jury instructed with respect to the lack of corroboration of an accomplice's testimony as affecting a jury's reliance upon it (1781a-1782a). See discussion *infra*.

> A co-defendant in a conspiracy trial occupies an uneasy seat. There generally will be evidence of wrong-doing by somebody. It is difficult for the individual to make his own case stand on its own merits in the minds of jurors who are ready to believe that birds of a feather are flocked together. If he is silent, he is taken to admit it, and if, as often happens, co-defendants can be prodded into accusing or contradicting each other, they convict each other. There are many practical difficulties in defending a charge of conspiracy which I will not enumerate."

The mass conspiracy trial concept, of which the present case is a prime example, corrupts all whom it touches. In this case the conduct of the trial typifies this corruption, for the record is barren of any form of corroboration as to nearly all defendants. The two principal witnesses here were Lafitte and Ewing. This case rests in large part upon their uncorroborated testimony. All conspiratorial knowledge of many defendants rests upon their word alone. And they do not know each other. Each testified principally only against different defendants, covering different periods of time.

Moreover, the actual conduct of the trial of this case, insofar as courtroom technique employed by both prosecution and defense is concerned, "will hardly convince one that a trial of this kind is the highest examplification of the working of the judicial process" (*Krulewitch* v. *United States*, *supra*, p. 454.) The conflicting interests of various defendants and the desire of the prosecutor to "sweep within the dragnet of conspiracy all those who have been associated in any degree whatever" (*United States* v. *Falcone*, 109 F. 2d 579, 581) with the conspiracy charged in the indictment, hardly make for the type and kind of trial of which the fed-

eral system of justice can be proud. *Grunewald* v. *United States*, 353 U. S. 391, 404.

Typical of the technique employed by the prosecution here is the order in which the defendants were named in the indictment, and in which they were required to be seated in the courtroom. This naming of defendants was ostensibly in the order of their "importance" to the case, with Harry Stromberg named first and Henry Teitelbaum named second in the indictment. To the jury they were given greater degrees of importance than the meagre proof against them properly should have indicated. Of course the Federal Rules of Criminal Procedure (see Rules 7(c) and 8, Federal Rules of Criminal Procedure) should be amended to require that in all multi-defendant indictments that defendants be named alphabetically; but until such change is effected we will continue to have this type of situation, unless and until prosecutors take it upon themselves to follow such a practice as the alphabetical naming of defendants.

A further example of the technique employed by the prosecution during this trial was the incident concerning the grand jury "practice" of his office. The government witness George Mahler was being cross-examined by Behrman's counsel, Maurice Edelbaum, Esq., when he was asked if he had been warned of his constitutional privilege against self-incrimination before the grand jury (1833a-1834a). He replied he didn't remember. The transcript of the grand jury proceedings disclosed that no such warning had been given and the prosecutor was asked to concede that no statement of warning appeared there. Instead he made the following statement:

> "I will make this statement to the Court, I will say this: It is customary (920) to warn all witnesses as to their constitutional rights" (1834a).

Objection was made to this statement, which was overruled. The prosecutor then continued:

> "I say it is customary by my assistants to warn all witnesses before a grand jury of their constitutional rights, one of which is to refuse to testify if they think their testimony might incriminate them. I don't know whether Mr. Goldschine, who is a representative of the Department of Justice who came up from Washington, followed that procedure or not. But I will inspect this and I will make a statement" (1835a).

It then developed that no such warning appeared in the transcript of the grand jury proceedings (1835a).

Then Stromberg's counsel moved for a mistrial on the grounds of improper conduct by the prosecutor for having made a statement before the jury "as to what his office does and what his assistants were instructed to do before the Grand Jury" (449a). The motion was denied.

It is clear that the effect of this type of unsworn statement by the prosecutor, repeated a second time to the trial jury after receiving tacit approval by the trial judge, was to put the dignity of the United States Attorney's Office behind such statements. The record disclosed no warning to the witness, but the prosecutor said it was "customary" to give the warning and his assistants were "instructed" to do so. Thus perhaps the record was wrong; or the witness did not remember that he had been warned and offered

the choice not to testify before the grand jury. It is all problematical, and at best argumentative. But in any event the technique employed before the trial jury was improper.

Finally, in the conduct of the trial, the mere allegation of "narcotics conspiracy" is enough to override the presumption of innocence of most defendants. The significance given to such a charge, even without any substantive counts, is devastating to a lone defendant, ostensibly caught up in the "dragnet of conspiracy." The hostility of juries to narcotics cases is too well known to require much discussion. It is for this reason that these trials must be conducted with a scrupulous regard for the rights of individual defendants, and it is at this point where this trial completely failed.

The Prosecutor's Summation

The prosecutor's summation to the jury, delivered at the close of the trial, is reprinted in full at pages 1539a-1617a of Appellants' Appendix. Of course the printed page cannot reproduce the full flavor of this summation, but the words delivered themselves are indicative of the character of the speech. In one respect, as to the statement that only one of the defendants "had the courage to take the stand" (1546a) as a witness in his own defense, the Court of Appeals held this comment to constitute error but decided that "in the context of this long trial we think the incident not so prejudicial as to require a new trial (Appendix hereto, *infra*, page 28a). However, this summation was replete with many improper arguments, statements, characterizations, and other comments as to prejudice seriously the rights of these defendants. The government's theory

was that this summation was proper as having been induced by improper summations by various defense counsel, as constituting attacks upon the prosecution and prosecutor. In support of this argument the government reprinted in its appendix portions of summations by various defense counsel (see Appendix for United States of America, pages 398a-461a). While it is true that one or two of the summations delivered by counsel for individual defendants might have contained improper argument, nevertheless the summation on behalf of Teitelbaum, as delivered by Max Fruchtman, Esq., his trial counsel, contained no single improper argument or statement. The sole excerpt from Mr. Fruchtman's summation to which the government points is contained at page 454a of the government's appendix, and in no sense can this excerpt be considered as containing any improper argument or statement.

Nor may the government justify or excuse an otherwise improper and prejudicial summation against Teitelbaum on the ground that other counsel for other defendants made improper summations and as to them the sort of summation made by the prosecutor constituted a proper reply to these attacks. Basically this is another of the fundamental arguments against the mass conspiracy trial concept. In no sense of the word can justice be achieved as to a person in Teitelbaum's situation with a trial under these conditions.

In detail some of the improper statements and arguments made by the prosecutor during his summation are as follows:

At the very beginning of this summation the following was stated (1540a-1542a):

> "And, while I hold no brief for the character of these men, they did testify honestly before this jury

and I am going to prove it. So you won't be ashamed of the testimony that they gave.

No, they have no halos around their heads, nor will I put them there. But I say that their testimony will be corroborated, is corroborated, and you will believe it as I believed it, because, if I didn't believe it, I wouldn't put them on the stand.

My obligation as United States Attorney in this case, as his Honor knows and as defense counsel know, is to represent the Government of the United States honestly and fairly. I am not compelled to take any case. Indeed, my oath of office and my (4435) duty prescribe that, if I don't think a case is worthy of presentation to the grand jury, I need only write on it 'I decline to prosecute.' No one questions it. If I don't like a case when an indictment has already been presented, I can file a nolle prosequi. I can stand up and say, 'Your Honor, in this case I don't believe the witnesses. The evidence is lacking. There is no corroboration,' any one of those reasons, and the Court will dismiss it on my motion. And there is no discredit to me, no discredit to the Government.

It is my duty to let innocent men go as well as to convict the guilty.

And in this case, let's get this straight: in this case I went through the evidence. I talked with the witnesses Ewing and Basile. The only witness I did not talk with before he took the stand of the principal Government witnesses was Lafitte, and I will deal at length with Lafitte, and I will show you how well he is corroborated, and how truthfully he testified in this case.

So let's get out of our minds the idea that I would lend myself as a party, acting on behalf of the United

States Government, to a frame-up (4435a) or a fraudulent prosecution. Indeed, I say, if one witness for the Government testified falsely from that stand, I would withdraw from this case.

(4436) Mr. Kove: If your Honor please, I regret this interruption, but I move for the withdrawal of a juror on the basis of that last remark.

The Court: Denied.

Mr. Fruchtman: If your Honor please, I join in that.

Mr. Stim: I join in that motion.

The Court: You all join in that one.

Mr. Williams: There are probably going to be a lot of objections to what is said in this summation.

Mr. Kove: That is objected to.

Mr. Williams: And motions for mistrials.

Mr. Kove: I respectfully object.

The Court: Motion denied.

Mr. Kove: And ask for instruction to the jury.

The Court: Overruled. Go ahead."

At pages 1542a-1543a the prosecutor stated:

"(4437) And I don't want you to be ashamed of the case. I tell you for four days, since Monday afternoon, you have been subjected to such a barrage of brainwashing as I have never heard. They tried to make you ashamed to go into the jury room or to believe any witness the Government had put on, I suppose even the narcotics agents. They wanted you to believe that Jack Cusack, with whom I have worked not only in this case but in other cases, was a crook, would frame innocent men; that we picked these men sitting around this rail out of all the 170 million people in the country without any more justification than that they happened to be known by Vellucci or by Ewing or by Lafitte or by Basile.

Tomorrow morning when I finish arguing this particular series of rebuttals I am going to take you over the Government's case in chief, and I am going to show you the corroboration. I am going to show you how the case was worked up from 1952 to 1955, with what difficulty the agents worked, how you learn a little here and then a little there and finally you put it together. You put it together the way Max Goldschine put it together, a man, again, who was subject to vilification that I have seldom heard, a special (4438) assistant to the Attorney General of the United States, an old civil servant who has been with the Department of Justice years and years, with no more motive. . . ."

At page 1552a he said:

"(4552) Ewing didn't have the dates right on something, a specific date. A lot was made about some other things. I forget what they were. Mostly grand jury inconsistencies.

Don't you think that, if we were going to frame someone in this case, we would have furnished him with all the data so there wouldn't be any inconsistencies? Why do you think there are inconsistencies?

Because the man is testifying honestly.

And Lafitte is testifying honestly. And Basile is testifying honestly. It is their only hope. It is all the Government asks. It is the only chance.

I would no more jeopardize the liberty of free men then you would by asking a witness to clean up inconsistencies in his testimony. The very inconsistency is proof that he is testifying honestly."

At page 1663a he said:

"Why didn't we ask Florence Hart to corroborate Ewing as to the fact of the money passing to Strom-

berg? Why didn't we ask Florence Hart to corroborate Ewing's testimony about Snyder delivering the suitcases? Because we are not crooked. Because this is not a framed case. Because Ewing is testifying honestly, and because I would be ashamed of myself if they were not. And I would not stoop to asking any witness to corroborate a person where it didn't happen and where they couldn't honestly corroborate him."

At page 1676a he said:

"Now I am going back to the very start of the summations.

Here I am going to be a lot faster than I was before, because I have used an hour and a half already, and I am allowed five hours.

The first thing I have is Mr. Taylor and Mr. Seto. There are only one or two things I will talk about there. One of the things I wanted to comment on there was his statement that there was no explanation of the absence of Vellucci. All I can say is that Vellucci I had here and he was equally available to the defense as to the prosecution. I only put witnesses on whom I believe."

Almost at the very beginning of his summation, the prosecutor made the following statement to the jury (1545a-1546a):

"I do not know how many witnesses the Government had but witness after witness, Lafitte, Ewing, Basile and the corroboration of the agents, Montefiore, Addato Lea, Bremer, of Rojas, who was the tenant opposite Joan Kaufman, down at 258 West 17th Street, all the corroboration of the hotel record, even defense witnesses corroborating them, *even Brisbois, who had the courage to take the stand*, corroborated—" (Emphasis added)

Immediately upon the making of this comment the following took place:

> "Mr. Edelbaum: Your Honor, we move for the withdrawal of a juror and for a mistrial by the very implication of that statement. It is a very subtle way—
>
> The Court: Denied.
>
> Mr. Stim: We join in that motion, Your Honor.
>
> The Court: I will assume that whenever one of you makes a motion that everybody will join with him."

Not content with having once made the foregoing statement, the prosecutor immediately thereafter repeated it (1546a):

> "*Brisbois, who had the courage to take the stand,* even corroborated Lafitte. What do you think of that." (Emphasis added)

At pages 1561a-1562a:

> "Now I want to come for a moment to the argument that Mr. Kove made. Mr. Kove has made an argument which I think he should have known better than to make because he himself has been an assistant United States attorney. But Mr. Kove said—I can't find it in my notes here but he said before—yes, before we brought in Basile to testify in this case that he was loaded for bear, that Cusack had visited him, he had (4467) interviewed him some twelve times in Brooklyn and four times here before we put Basile on.
>
> Now in the first place, as I say, Basile was involved in the case in Brooklyn. Basile had been in the business a long time. There were many transactions and

many other matters, obviously, that the Narcotic Bureau wanted to find out about from Basile.

Then you know what agents do. They go over to a court and wait around to try to see a man who is—

Mr. Kove: If your Honor please, I object to this.

The Court: Overruled.

Mr. Kove: There is no evidence in this record of any of this.

The Court: Overruled."

At page 1539:

"I am not going to deal in generalities; I haven't got time. I have been allowed five hours to answer 15 hours of the most subtle argument, cleverly distorted pictures of parts of the case, by the most able criminal lawyers practicing before any bar of justice."

At pages 1555a-1556a:

"By the way, how would any of you like to sit on that witness stand and be subjected to the kind of treatment that the witnesses have been subjected to in this case? Is it any wonder people don't want to (4458) testify?"

At page 1545a the prosecutor stated:

"So from the very end of the table, with the broad sweep all the way around to Mr. Polakoff, you have the repeated vilification of Goldschine and Cusack, and the three principal witnesses of the Government, Lafitte, Ewing and Basile, because they know they are not going to get an acquittal in this case but they hope to instill enough doubt in your minds—

Mr. Polakoff: Your Honor, I object to that statement.

Mr. Williams: Your Honor, this is argument and they know it.

Mr. Polakoff: That is going far afield, your Honor. It is contrary, in my opinion.

The Court: Overruled.

Mr. Williams: You realize that I am arguing to you just as counsel argued to you, and when I say (4452) something like that, it is argument. You realize that.

I am not saying that you cannot bring in a verdict of acquittal, but I say that if you brought in a verdict of acquittal it would be very surprising and I think that what counsel have done is to hold a meeting, I think, and they decided they have got to get a villain in this piece, someone to take the attention away from the facts of the case, someone to mislead you as to where the truth lies because there were witnesses testifying."

At pages 1563a-1564a:

"Now they say why didn't we produce the record of a telephone call?

You know after a period of time records are destroyed.

Mr. Edelbaum: I object to that. There is no such testimony in this record.

The Court: Overruled.

Mr. Williams: Telephone companies don't keep records forever and after a short period of months incoming records of calls, incoming, records of them are destroyed."

At page 1572:

"After the usual attack on Ewing Mr. Polakoff went to the St. Moritz Hotel and he asked me why no records, and I'll tell him why there were no rec-

ords produced from the St. Moritz Hotel. You remember Ewing testified that in August and in the fall of 1955 Stromberg was staying at the St. Moritz Hotel. I'll tell you why they weren't produced. Because that testimony was never contradicted. I'll tell you why they weren't produced by Mr. Polakoff. Because they would show that Stromberg was registered at the St. Moritz Hotel and those records are easily—as easily available (4484) to him as they are to me.

Mr. Polakoff: If your Honor please, I object to that statement what the records would show.

The Court: Overruled."

At page 1571a:

"And while I am on the subject of Ewing, also, I don't want you to think that we didn't know his record, and that we didn't attempt to bring it out."

At pages 1569a-1570a the prosecutor made this statement:

"There is no doubt from the testimony in this case, even from Lane, Stromberg's partner, that Heinzie, Mr. Teitelbaum, visited Stromberg at Studio Frocks. Why? Why this intimacy? Has it been explained to you? He was seen in restaurants by the people who own the restaurants, by the waiters, by the waitresses. They recognized Teitelbaum, Heinzie, the man who sits next to Stromberg. Why did he go around with successful businessman, a man like that? This man of substance.

Mr. Polakoff: Your Honor—

Mr. Williams: Has that question been answered?

Mr. Polakoff: Will your Honor tell the jury that the seating was arranged by the Court according to the names in the indictment?

Mr. Williams: Mr. Polakoff, I certainly don't want to suggest that because Mr. Teitelbaum is sitting next to Mr. Stromberg that it has any significance here at all. I think they are named that way in the indictment, Stromberg first and Teitelbaum next.

Now you know what the Government's contention is, and I don't need to repeat it, that Teitelbaum was the associate, the bodyguard—

Mr. Polakoff: I object to that, your Honor. (4480) There hasn't been a scintilla of proof of that, and that is unfair.

Mr. Fruchtman: If your Honor please, I move for a mistrial on behalf of the defendant Teitelbaum.

The Court: Motion denied.

Mr. Fruchtman: I respectfully except.

Mr. Polakoff: Is your Honor going to make any ruling on the statement about the bodyguard?

The Court: No. He is arguing to the jury and lawyers will argue and argue and argue.

Go ahead.

Mr. Polakoff: I respectfully except."

At page 1544a he stated:

"Have we sunk so low that the Attorney General would send a special assistant from Washington to make a conspiracy case against innocent men? If we have sunk that low, if you think so, then we might as well turn this country over to the Russians.

Mr. Kove: If your Honor please—

Mr. Edelbaum: Now, your Honor, we move for a withdrawal of a juror and for a mistrial.

The Court: Denied.

Wait a minute. That's all.

Mr. Gottesman: May we all join in?

The Court: You may all join.

Motion denied. Go ahead."

At page 1570a:

"And how many lieutenants can you get to testify in a narcotics conspiracy case? And why do you (4481) think we have Ewing over in the St. George Hotel under a guard of two Treasury agents?

Mr. Delaney: I move for a mistrial, if the Court please.

Mr. Edelbaum: I object.

Mr. Polakoff: I ask for a mistrial.

The Court: Now I don't want any argument. I don't want any argument. I told you before I don't want any argument. The motion is denied.

Mr. Edelbaum: Exception, your Honor.

The Court: And you will draw no inference from the fact that he is in the presence of agents or anybody else in the St. George Hotel."

The real importance of this remark during the prosecutor's summation is to be found in the insinuation to the jury that it was necessary for Ewing to be kept at the Hotel St. George under heavy guard of government agents to prevent an attempt to assassinate him by one or more of the defendants against whom he testified, or their underworld allies acting on their behalf. Previously during Ewing's direct examination, early in the trial and many weeks before this summation, he had been asked the following questions by the prosecutor, and the following colloquy took place (473a-474a):

"Q. By the way, where do you live now? What is your address now? A. What is my address now?

Q. Don't be afraid to give it to us.

Mr. Edelbaum: I object to that, your Honor, and move for a mistrial.

(Other voices, Mr. Polakoff, Mr. Fruchtman, Mr. Kove and Mr. Chapman standing.) I object.

Mr. Edelbaum: That is the second time.

The Court: I will deny the motion for a mistrial.

Mr. Williams, you must desist. That statement was improper. It should not have been made.

There is no inference to be drawn from it. There has been some discussion that the jury has heard with regard to Lafitte as to whether he ought to give an address. There has been some discussion with this witness as to whether he ought to give an address. During the recess I have instructed that from now on all witnesses will have to give their addresses.

Mr. Williams: That is all I alluded to, your Honor, I apologize.

The Court: All right.

Mr. Edelbaum: Let's not make it worse.

(984) The Court: All right."

Thus in the context of a direct rebuke from the district court to a prior insinuation by the prosecutor that the disclosure of Ewing's address might lead to physical harm to his person if his address was disclosed, nevertheless during the summation, weeks later, the remark that it was necessary for Ewing's personal protection that he be kept "under a guard of two Treasury agents" in the Hotel St. George, achieves greater significance and importance, especially in light of the failure and refusal of the district court on the latter occasion to rebuke the prosecutor for such improper argument.

Not all of the objectionable material contained in this summation has been reproduced herein; but it is believed that enough has been set forth to demonstrate clearly the

character and content of this summation, so as to call for the invocation by this Court of its corrective supervisory function over the lower federal courts and over the conduct of prosecutions in the name of the United States of America.

The Charge of the Trial Court

For the purposes of this petition, petitioner Teitelbaum will point to only two aspects of the charge of the trial court for his claim that this charge was legally insufficient and that the failure to charge as requested by various defendants was prejudicial error as a matter of law to all defendants on trial, under the circumstances of this case.

Each of three government witnesses gave principal testimony against different defendants or groups of defendants. They were Lafitte (a paid informer), Ewing (a co-conspirator) and Basile (a co-conspirator). None of these witnesses' testimony was corroborated in any single material aspect. As to Ewing and Basile, since there was no corroboration, as a matter of law the defendants were entitled to the charge they requested, which in substance was that there was no corroboration of these accomplices or co-conspirator witnesses as a matter of law and that the jury was to consider their testimony with great caution and care, and they were not to place too much reliance upon such testimony or to convict a defendant on such uncorroborated testimony unless they believe it beyond all reasonable doubt (1618a-1619a, 1624a).

Instead the trial court denied such requests and thereupon put the emphasis the other way in his charge when he emphasized the ability of the jury to believe and consider

this testimony. The charge on this crucial point reads in its entirety as follows (1781a-1782a):

> "As to the testimony of witnesses who are alleged to have agreed or confederated with any or all of the defendants in the commission of the crime charged in the indictment, you must consider their testimony carefully and act upon it with caution. In this category falls the testimony of Ewing, Basile, Hart and Frank. Here again, however, I am not saying that because a person was a co-conspirator or an accomplice, he or she is necessarily not to be believed. You may conclude that their testimony is entirely credible. And in the federal courts a defendant can be convicted upon the uncorroborated testimony of an accomplice whose testimony satisfies the jury of the defendant's guilt."

As to the testimony of Lafitte, who is well known for his testimonial activities in the federal courts, the lack of corroboration of his testimony called for proper instruction to the jury. This was requested and denied. See *United States* v. *Reina*, 242 F. 2d 302; *United States v. Aron*, 239 F. 2d 857; *United States* v. *Sansone*, 231 F. 2d 887; *United States* v. *Kretske*, 220 F. 2d 785, reversed and remanded on confession of error by Solicitor General, 350 U. S. 807.

REASONS FOR GRANTING THE WRIT

The reasons for granting the writ of certiorari in this case, and in the cases of all related petitioners arising out of the trial of this indictment, are many. Fundamentally, however, the principal reason for granting the writ is the necessary exercise by this Court of its supervisory power to formulate and apply proper standards for enforcement

of the criminal law in federal courts. *Bruno* v. *United States*, 308 U. S. 287; *McNabb* v. *United States*, 318 U. S. 332; *Marshall* v. *United States*, 360 U. S. 310. This necessarily includes supervision over standards of proof, matters of evidence and the conduct of trials. In this context, and for the reasons set forth below, it is submitted that the petitions of all petitioners arising out of this case should be granted.

1. It was not proper in this case to hold a mass conspiracy trial of 19 defendants, on a single count indictment naming 46 defendants and 16 co-conspirators not named as defendants, where the proof tendered showed, at best, many separate conspiracies involving unrelated defendants or groups of defendants, at widely separated periods of time, and which thus resulted in a material and prejudicial variance between the indictment and the proof.

Apart from the inherent unfairness of the mass conspiracy trial to a lone defendant caught up in the "dragnet of conspiracy" (*United States* v. *Falcone, supra*), as discussed *supra*, at pp. 14-18, it is submitted that in this case the allegation of a single continuous conspiracy in the indictment was not proved. Even considering the credibility of such witnesses as Lafitte, Ewing and Basile, the proof, at best, shows many separate and independent conspiracies, separated both as to membership and in point of time. Moreover, for a period of approximately one year there was a complete cessation or hiatus of any claimed criminal conduct; that was the period from December 1952 to December 1953. To supply the defect of proof of the continuance of the conspiracy alleged in the indictment, the government

and the Court of Appeals have relied upon a "presumption" of continuity, citing such cases as *Hyde* v. *United States*, 225 U. S. 347 and *United States* v. *Cohen*, 145 F. 2d 82, cert. den. 323 U. S. 799, among others (see p. 12a, *infra*). Thus a "presumption" is used as a substitute for evidence of continuity, a theory rejected by the same Court of Appeals in *United States* v. *Russano*, 257 F. 2d 712, where the court held "there is not only an absence of evidence indicating a continuing conspiracy, but also an absence of evidence indicating that these two appellants were members of any conspiracy that was in existence during 1953 and 1954" (p. 716).

In this case it is clear that there was no evidentiary connection between the persons named in the earlier part of the alleged conspiracy, according to Lafitte's testimony, that is, Aron, Gelb, Baruche, Brisbois, Danis, Samnick and Buccelli, among others, for the period prior to December 1952; or the persons named by Ewing in the March 1954—Fall of 1955 period, including Stromberg, Teitelbaum, Vellucci, Behrman and the so-called retailers, Lewis (who was acquitted by the trial court), Pasqua (as to whom the government confessed error during the pendency of the appeal in the Court of Appeals), the Lessa brothers, deSaverio, Seto, and Saul Snyder (whose conviction was reversed by the Court of Appeals); nor was any connection established by the persons as to whom Basile testified, Maimone and Mirra, and the others. As in the *Russano* case, the evidence does not show that the various persons as to whom the different witnesses testified were ever connected together during the same period of time. In other words, Teitelbaum is not shown to have been connected with the earlier phase of

the alleged single continuous conspiracy, and not at any time with any of the persons named in evidence to have participated in the earlier (1950-1952) period. Thus if it is the government's contention that Teitelbaum joined an already existing conspiracy, the continuance of that conspiracy to the time of his joining must be established by *evidence*, not by a *presumption* of continuity. This appears to be the *rationale* and teaching of *Russano* in this troublesome field of federal criminal law. The "presumption" of continuity, to which the various decisions refer, means no more than the permissive inference that those who are already shown to be engaged in a criminal conspiracy cannot point to gaps in time during their conspiratorial conduct as indicative of the cessation of such activity which is later resumed. The last overt act proved is always taken to be the end of the criminal agreement. *Grunewald* v. *United States, supra,* and cases cited therein. But this presumption may not be used as a substitute for evidence of the present existence of a conspiracy, after a long period of inactivity, to charge a defendant with joining this conspiracy as evidenced by his later conduct. In this case the entire cast of characters of the conspiracy changed during the hiatus or inactivity period. None of the persons as to whom Lafitte testified is shown to be a member during the period of Ewing's testimony, or that of Basile's testimony. The sole possible exception to this statement is Behrman, as to whom Lafitte did not testify, but whom Ewing met with Gelb, a member of the earlier group.

Ewing's testimony in this regard is quite revealing. He stated Vellucci "told" him that they were going to do business with a "mob around 50th and Broadway" (458a)

and that he had made a "connection" with Behrman and Gelb (459a). Thereafter Gelb's surveillance and arrest on March 5, 1954 eliminated him from the conspiracy. Behrman alone remains the link to the past group, and only because he and Gelb were known to be associated together from December 1953 to March 5, 1954. In effect, Vellucci was not then joining an existing (1950-1952) conspiracy with Ewing when he started to do business with Behrman and Gelb; but at best a new conspiracy was started. And when Gelb's arrest eliminated him, the turn to Stromberg was not the further continuance of the existing (1950-1952) conspiracy, but again at best, still another new agreement.

Since most of the government's theory of continuance, apart from the reliance upon the presumption of continuity, rests upon Ewing's testimony, it must be stated candidly that his testimony for this purpose was inadmissible hearsay. This testimony consisted of the narration of past events, gossip and talk not looking towards the furtherance of the conspiracy. His testimony is replete with such gossip, as has been pointed out before, and as such it was improper to receive it in evidence. *United States* v. *Nardone*, 106 F. 2d 41, 43, reversed, 308 U. S. 338; *United States* v. *Eng*, 241 F. 2d 157, 159; *Lutwak* v. *United States*, 344 U. S. 604, 617-618; *Fiswick* v. *United States*, 329 U. S. 211, 217; *Logan* v. *United States*, 144 U. S. 263, 308-309.

Although the analysis of the various conspiratorial groups in this case is not being exhaustively undertaken in this petition, nevertheless it is believed that the analysis thus far made clearly shows that this case, as exemplified by the opinion of the Court of Appeals, violates the teaching of this Court in such cases as *Kotteakos* v. *United*

States, 328 U. S. 750 and *Grunewald* v. *United States*, *supra*, among others. See especially *Krulewitch* v. *United States*, *supra*. The opinion of the Court of Appeals in this case causes one to believe that that court apparently declines to follow the mandate of this Court in the cases which attempt to limit the broadening concept of mass conspiracy trials. It is no wonder then that the use of the mass conspiracy trial technique, with its inherent prejudicial evils, such as the application of loose rules of evidence, is increasing in many federal districts, especially in the Southern District of New York. Long ago Judge Learned Hand aptly termed the concept of criminal conspiracy as "that darling of the modern prosecutor's nursery" (*Harrison* v. *United States*, 7 F. 2d 259, 263 (1925)). He foresaw with much clarity that this concept, and, as he later put it, "the dragnet of conspiracy" (*United States* v. *Falcone*, *supra*), do not make for fair trials fo individual defendants whose interests are somehow overlooked, lost or submerged in the course of the mass trial.

It was this Court's opinion, however, in *Kotteakos* v. *United States*, *supra*, to which one must look for proper guidance on the proposition that error committed during the course of a trial, such as the one in this case, is prejudicial error under the circumstances which are present here:

> "But if one cannot say, with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error, it is impossible to conclude that substantial rights were not affected. The inquiry cannot be merely whether there was enough to support the result apart from

the phase affected by the error. It is rather, even so, whether the error itself had substantial influence. If so, or if one is left in grave doubt, the conviction cannot stand" (p. 765).

2. There was not sufficient credible evidence to sustain the jury's verdict as to Teitelbaum's purported participation in the conspiracy charged in the indictment, or in any criminal conspiracy. When it be considered that the Court of Appeals reversed the convictions of Samnick, Danis and Snyder on evidence of the same character as was adduced against Teitelbaum, a comparison of the quality and quantity of this evidence cannot but lead to the conclusion that Teitelbaum's conviction was unjustified and the failure of the Court of Appeals to reverse his conviction was prejudicial error.

Teitelbaum's participation in the events as to which Ewing testified was minor indeed. The only event of any significance was the alleged delivery of money to Teitelbaum by Vellucci and Ewing. As to this testimony there is much dispute and conflict since Teitelbaum was at his work at the time of any such meeting. Taken in connection with Ewing's character, the testimony is rather weak. Compare the story of Snyder delivering two suitcases of heroin to Vellucci and Ewing, which the Court of Appeals in substance rejected, with the Steak Joint delivery of money to Teitelbaum, which that court accepted. No reason for the difference in decision is clearly made in the court's opinion. Compare also the totality of the evidence against Samnick and Danis in this regard.

The Court of Appeals stated that the jury could infer or believe that "Teitelbaum knew of the common plan"

(*infra*, p. 23a) from his presence with others when narcotics was discussed, and this, together with his receipt of the payment from Vellucci and Ewing, was sufficient to sustain its verdict as to him. As to the first proposition, Teitelbaum's presence alone is not evidence of membership or participation in the criminal venture. *United States* v. *Di Re*, 332 U. S. 581, 593; *Hicks* v. *United States*, 150 U. S. 442, 447; *United States* v. *Peoni*, 100 F. 2d 401, 402. As to the second proposition, the evidence of Teitelbaum's acting as a messenger to pick up the money from Vellucci and Ewing, is extremely weak. Taken in terms of Teitelbaum's defense, Ewing's failure to give testimony about this purported incident before two separate grand juries has significance in the totality of this case.

Also in view of the totality of the evidence against Teitelbaum, the comment by the prosecutor during his summation, when he characterized Teitelbaum as Stromberg's "bodyguard" (1570a), was severely prejudicial. There was no scintilla of evidence in the record to support this characterization; and if it is to be believed, then Teitelbaum's part in this case is minor by comparison to others. However, Teitelbaum was sentenced to four years imprisonment, which is indicative of the fact that his participation in this case was deemed by the trial court to be more than that of a mere minor figure.

Under all the circumstances of this case, with the paucity of proof against him, it is apparent that the overwhelming "atmosphere" of the trial was the substitute for evidence against Teitelbaum which resulted in his conviction. Accordingly this conviction should be reviewed by this Court by certiorari.

3. The district court erred in excluding from evidence, as defense exhibits, the certified transcript of the Navy general court-martial of Ewing, and the records of the New York State Bureau of Motor Vehicles, which contradicted his claim of legitimate employment. As has been set forth hereinabove, *supra*, pp. 12-13, the circumstances under which these exhibits, which materially contradicted Ewing's testimony, were offered into evidence, and rejected by the trial court, disclose that it was error to refuse to allow these exhibits to go to the jury. They were competent and material evidence on the question of Ewing's credibility, upon which depended the guilt or innocence of many of the defendants on trial, including Teitelbaum. See McCormick, *Evidence* (1954) Par. 34, p. 92; 4 Wigmore, *Evidence* (3rd ed.) Par. 1270.

4. The redirect examination of Ewing was improper and prejudicial. When it is considered that Ewing's credibility was substantially discredited during the long cross-examination of him by various defense counsel, it became necessary for the government to rehabilitate him, if possible, in order to save the case against many of the defendants, if possible. Thereupon, in order to re-establish and rehabilitate Ewing's credibility, the prosecutor asked the following question on redirect examination:

> "Q. When you were first called before the grand jury in Detroit and you testified before the grand jury for two days, I think it was two or three days, and from some 41 pages, did you tell the grand jury in answer to Mr. Goldschine's questions all the facts in detail which you have testified to here in this courtroom?" (876a).

Over objection, the district court permitted the witness to answer. The answer was "I did, yes."

Thereafter, the following question was put to him by the United States Attorney:

> "Q. Were the questions that were put to you before the grand jury in Detroit framed in the same language as the questions that have been put to you here?" (877a).

Various objections were made to the form of the question, grounded in such arguments that the previous minutes speak for themselves, and that the prosecutor may read whatever portions of the grand jury testimony he wishes. The objections were overruled. After the question was repeated to the witness, the district court stated as follows:

> "I am going to say to you what I said to you when you were cross examined, listen to the question and when you don't understand one say so" (878a).

The witness then answered, "I don't understand the question."

The following question was then put to the witness:

> "Q. Mr. Ewing were the same questions put to you in exactly the same manner before the grand jury in Detroit that we have asked you here both on direct and cross?" (878a).

Again, various objections were made and overruled and the witness made the following answer: "Yes, sir."

> "Q. They were put in the same manner? A. No."

The district court then said that the whole thing was "silly"; but in the end Ewing was permitted to testify

that previously he had not been asked in detail about what he was asked here in court (880a-881a).

Then the following occurred:

"By Mr. Williams:

"Q. With respect to the defendant Stromberg, were you asked, before the grand jury, to give your complete testimony in detail as to every meeting with Stromberg?" (882a).

Over objection, during which it was pointed out to the trial court that Mr. Williams could read whatever statements he wanted from the grand jury minutes to the jury, the district court overruled the objection:

"Q. What is your answer? A. No."

The district court, over objection, then permitted the same type of question to be asked as to Teitelbaum (882a-883a), and then identical questions as to many of the other defendants involved in the case.

Then the following question was asked:

"Q. Do you know, Mr. Ewing, whether the Government put its entire case before the grand jury?" (885a).

Objection to this highly improper question was sustained. Then a motion for a mistrial was made, in light of the connotation of such improper question, that the entire case had not been presented to the grand jury. However the district court denied this motion (886a). Thereafter the district court instructed the jury concerning inconsistent testimony and grand jury functions in the following pertinent terms:

> "Therefore in that connection you will have to consider number 1, whether the witness was lying before the grand jury or whether he is lying here or whether he made a mistake or it was an honest mistake or whether or not it was a complete exhaustion of everything the witness was supposed to tell the grand jury and therefore when he failed to tell it to the grand jury and told us here the full story, whether or not his failure to tell the grand jury was inconsistent and therefore a falsehood". (897a-898a).

Apart from the very misleading and confusing nature of this statement, this instruction approved the theory of the prosecutor that the witness was to be the sole judge of whether he was asked to tell his full story before the grand jury and thereby he was enabled to explain the inconsistencies between his trial testimony and his grand jury testimony.

The district court then instructed the jury, at the request of the United States Attorney, as to the necessity or requirement of the government to prove a *prima facie* case before the grand jury (900a-901a).[3] Thereupon a motion was made by Moses Kove, Esq., attorney for one of the other defendants, which applied to all the defendants, for withdrawal of a juror and a mistrial on the grounds that in effect the court's statement to the jury could be construed as a rehabilitation of the witness if his credibility has in any way been affected by the cross examination. This motion was denied (902a).

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[3] The use by the trial court during this instruction to the jury of the expression, "*prima facie* case", itself was prejudicial error. *McAdams* v. *United States*, 74 F. 2d 37, 40; *Ezzard* v. *United States*, 7 F. 2d 808; *Chaffee* v. *United States*, 18 Wall (85 U. S.) 516.

It is undoubted that the rehabilitation technique adopted by the prosecutor here was improper and prejudicial. And the trial judge's instruction or charge thereupon delivered only aggravated the situation. The purpose of cross-examination of any witness, especially a Ewing, is to contradict him. Here the reference to Ewing's grand jury testimony by the cross-examiners was to point up the omissions and contradictions in his trial testimony. To permit the prosecutor to rehabilitate Ewing by the above-described technique was prejudicial error. Moreover this sprawling type of question put to Ewing on this redirect examination was improper and prejudicial, calling mainly for opinions and conclusions from one not qualified as an expert. See, McCormick *Evidence, supra,* Par. 39, pp. 105-110 and 4 Wigmore, *Evidence, supra,* Par. 1110, *et seq.* especially Par. 1126, on the proper purposes and methods of rehabilitating an impeached witness. See also *United States* v. *DiCarlo,* 6 F. 2d 364; *Gelbin* v. *New York, N. H. H. R. Co.,* 69 F. 2d 500; *Cf. United States* v. *Sherman,* 171 F. 2d 619, 622. The trial judge's participation in this episode compounded the prejudice to the detriment of all the defendants on trial.

5. The district court erred in permitting the United States Attorney to state in open court, but not as a sworn witness, what if anything, took place before the grand jury and the grand jury "practice" of his office; and the district court further aggravated the error by then instructing the trial jury concerning the functions of a grand jury and the quantum of proof necessary before a grand jury to return an indictment.

The facts of this occurrence during the trial have been set forth in detail, *supra*, pp. 16-18. No detailed argument of this erroneous conduct on the part of the prosecutor, and then the trial court, appears to be necessary. The Second Circuit itself has condemned this practice. See, *e.g.*, *United States* v. *Pepe*, 247 F. 2d 838, *United States* v. *Tomaiolo*, 249 F. 2d 683; *United States* v. *Spangelet*, 258 F. 2d 338. As the Court of Appeals stated in the *Spangelet* case (pp. 342-343), by the same judge who wrote the opinion in the case at bar:

> "In United States v. Pepe, 2 Cir., 247 F. 2d 838, we held it improper for the prosecuting attorney himself to take the stand to impeach the testimony of a witness. We think the prosecutor's conduct here was equally improper: in effect, he gave testimony as to a fact allegedly within his personal knowledge without taking an oath or subjecting himself to cross-examination. People v. Lovello, 1956, 1 N. Y. 2d 436, 154 N. Y. S. 2d 8, 136 N. E. 2d 483."

Moreover, *Berger* v. *United States*, 295 U. S. 78, suggests that in reliance upon the obligation of a sovereignty to govern impartially, a jury may place more confidence in the word of a United States Attorney that in that of an ordinary member of the bar. Thus when the prosecutor put into issue his own professional integrity, the error was prejudicial since no refutation of his statement was possible, whether directly or by cross-examination.

Finally the trial judge, by his "instruction" to the jury at that point in the trial, and later on, several weeks later, in his closing charge, compounded the error. Near the end of his closing charge the trial judge stated:

"However, I want to tell you again that the Government is not required to make out as complete a case before the Grand Jury as they would at trial" (1783a).

6. The prosecutor's summation was so grossly unfair and improper as to deprive the defendants of a fair trial and certain statements therein were deliberately stated and were calculated to mislead the jury. The failure of the district court to take proper action to rebuke the prosecutor for such misconduct further deprived the defendants of a fair trial. Some of the details of this summation have been set forth hereinabove, *supra,* pp. 18-31. Since these words speak eloquently for themselves, no further elaboration of them appears necessary. However, this summation must be characterized as one of the most improper ones ever delivered in the district court for the Southern District of New York, and this is indeed a mild description. Considering the statement of Mr. Justice Sutherland, late of this Court, in *Berger* v. *United States, supra,* p. 88, when assessing the prejudicial character of this summation, requires one to concede that prejudicial harm resulted to these defendants in this case:

"The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or inno-

> cence suffer. He may prosecute with earnestness and vigor—indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one."[4]

Although constant objections were made to many parts of the summation, these all went without admonition or rebuke by the trial court; this too compounded the prejudice to the defendants. *Berger* v. *United States*, *supra*, p. 85; *Steele* v. *United States*, 222 F. 2d 628, 631; *Henderson* v. *United States*, 218 F. 2d 14, 19; *United States* v. *Pepe*, *supra*, p. 844; *United States* v. *Tomaiolo*, *supra*, pp. 694-695; *United States* v. *Spangelet*, *supra*, p. 343.

The comment that only defendant Brisbois of all defendants on trial "had the courage to take the stand" (1546a), was not rebuked or criticized by the trial judge, and in spite of the unanimous objections by all trial counsel, was immediately repeated by the prosecutor (1546a). This especially was prejudicial error. *Wilson* v. *United States*, 149 U. S. 60; *Reagan* v. *United States*, 157 U. S. 301; *Hilton* v. *United States*, 221 F. 2d 338, 342; *Rice* v. *United States*, 35 F. 2d 689; *DeMayo* v. *United States*, 32 F. 2d 472; *United States* v. *Hamilton*, 97 F. Supp. 123, 129. The Court of Appeals itself considered this comment as error, but stated it was "not so prejudicial as to require a new trial" (*infra*, p. 88a).

Another portion of the summation, where the defense counsel were called "the most able criminal lawyers prac-

[4] This statement is printed as a preface to the practice handbook for United States Attorneys published by the Department of Justice.

ticing before any bar of justice". (1539a), was prejudicial in that it insinuated to the jury that as such "most able criminal lawyers" they would receive substantial payment for their services and that the source of such payment would be the huge profits reaped by the defendants from their purported participation in the alleged narcotics conspiracy. This Court recently reversed a conviction on a much milder statement, when the Solicitor General confessed error as to such comment. *Handford* v. *United States*, 359 U. S. 120. Furthermore, three of the trial counsel were court-appointed, serving without fee for indigent defendants during this long trial (1639a). These indigents were also represented by assigned counsel on their appeal. (*Infra*, p. 34a).

The characterization of Teitelbaum as the "bodyguard" of Stromberg was, as to him, extremely prejudicial (1569a-1570a). There was no evidence in the record to support this description. Moreover the connotation and suggestive significance of the term "bodyguard", as that term is commonly used, refers to a person employed by a racketeer or hoodlum or person whose pursuits are illicit, and therefore attendant with danger of personal bodily harm, requiring the personal protection of such other person, usually a thug or strong-arm man, against such danger. This remark indicated to the jury the prosecutor's personal knowledge of such fact, otherwise it would not have been made. The trial court let the characterization stand without rebuke or admonition (1570a).

The remark, "If you think we have sunk that low, if you think so, then we might as well turn this country over to the Russians" (1544a), was so inflammatory and preju-

dicial that it too alone requires reversal of these convictions. This remark also went uncorrected and unadmonished by the trial judge, despite objections by defense counsel.

Finally, the treatment of the remark: "And why do you think we have Ewing over in the St. George Hotel under a guard of two Treasury Agents" (1570a), in context of the prior rebuke and admonition by the trial court for the prosecutor's comment about Ewing not being "afraid" to give his address now (473a-474a), makes this comment during summation all the more prejudicial.

Not all of the excerpts from this summation reprinted *supra*, pp. 18-31, have been discussed at this point, although each contains seeds of prejudice sufficient to warrant separately reversal of all convictions herein. Nevertheless, it is submitted that the entire handling of this summation by the trial court constituted prejudicial error to the defendants. *Berger* v. *United States*, *supra*, p. 89; *New York Central R. Co.* v. *Johnson*, 279 U. S. 310, 318; *United States* v. *Pepe*, *supra*, pp. 844-845. *Cf. Quercia* v. *United States*, 289 U. S. 466, 469.

The government's sole argument to justify this summation was that it was a proper response and attack upon the summations delivered by defense counsel. Even if it be conceded that several of these defense summations were improper and justified the sort of response they elicited, the summations of many defense lawyers, including Teitelbaum's trial counsel, contained no single improper remark. Why then should the government reap the benefit against Teitelbaum for another's impropriety. At bottom the concept of the mass conspiracy trial is at issue here; but surely

Teitelbaum did nothing to deserve the prosecutor's summation directed at him, including the damning "bodyguard" remark.

In any event, in spite of the purported provocation, the prosecutor's summation went far beyond the bounds of propriety and was prejudicial to the extreme.

7. The Court of Appeals erred in this case in holding that no prejudice resulted to the defendants while holding that the prosecutor's summation constituted error when he stated that only one of the defendants "had the courage to take the stand" as a witness in his own defense. Since there has been much discussion of the prejudicial nature of the prosecutor's summation, *supra*, pp. 18-31, 46-50, no further statement thereof will be made here.

Petitioner Teitelbaum's point here is that in the totality of the factual and evidentiary situation of this case, the holding by the Court of Appeals of no prejudice on the foregoing point was erroneous. In light of the type of proof adduced here, consisting mainly of uncorroborated accomplice or co-conspirator testimony, on a mass trial of conspiracy only, the failure of the Court of Appeals to reverse these convictions for the conceded erroneous summation was error, requiring review by certiorari. *Kotteakos* v. *United States, supra*, pp. 773-777; *Berger* v. *United States, supra*, p. 89; *Krulewitch* v. *United States, supra*, pp. 454-455; *Bihn* v. *United States*, 328 U. S. 633; *Marshall* v. *United States, supra.*

8. The defendants on trial were entitled, as a matter of law, and after request in writing, to have the jury charged that they were to consider the uncorroborated testimony of

an accomplice and co-conspirator with great caution and care, and that they were not to convict a defendant on such uncorroborated testimony unless they believed it beyond all removable doubt. The failure and refusal of the district court to charge the jury in this way was prejudicial error as a matter of law. In this matter, as in others, the details are set forth hereinabove, *supra*, pp. 31-32.

In the *Krulewitch* case, *supra*, p. 454, Justice Jackson, late of this Court, wrote, respecting "accomplice" testimony and the trial court's charge to the jury thereon, as follows:

> "Moreover, in federal practice there is no rule preventing conviction of uncorroborated testimony of accomplices, as there are in many jurisdictions, and the most comfort a defendant can expect is that the court can be induced to follow the 'better practice' and caution the jury against 'too much reliance upon the testimony of accomplices.' *Caminetti* v. *United States*, 242 U. S. 470, 495."

Thus this Court has recognized the problem respecting "accomplice testimony" and has on other occasions, besides *Caminetti* and *Krulewitch*, cautioned against excesses committed against defendants in jury charges on this point. *Holmgren* v. *United States*, 217 U. S. 509; *Cash* v. *Culver*, 358 U. S. 633; *Cf. Weiler* v. *United States*, 323 U. S. 606.

Having made the request for the instruction, the defendants were entitled to it, as a matter of law, and although the district court was not required to charge the jury in the language of the written request, he should have adapted the requests to language of his own choosing while conveying the substance of the requested charge. *Sugarman* v.

United States, 249 U. S. 182; *United States* v. *Kushner*, 135 F. 2d 668. The requests to the effect that Lafitte, Ewing and Basile were uncorroborated should have been granted, since this was so as a matter of law; and the defendants were entitled to such charge in the face of the arguments of the prosecutor during his summation that these witnesses "will be corroborated, is corroborated, and you will believe it as I believed it, because, if I didn't believe it I wouldn't put them on the stand." (1540a)

There is presently pending before this Court a petition for writ of certiorari in the case of *Audett* v. *United States*, No. 91, October Term, 1959, in which petitioner there requests this Court to fashion a definitive rule respecting corroboration of accomplice testimony and jury charges on this point. It is submitted that if certiorari is granted in that case, the point of issue will cover this case as well.

In the light of the recommended instructions to juries in criminal cases written by Honorable William C. Mathes, United States District Judge for the Southern District of California, 20 F. R. D. 231, *et seq.*, the instruction on accomplice testimony, Form 12 (p. 244), was the form that should have been used in this case. It was rejected in this case, however, in favor of a charge which put the emphasis in favor of believing or accepting the uncorroborated testimony of an accomplice such as Ewing. See *supra*, p. 32. Certiorari should be granted on this point.

9. Under all of the circumstances of this case, where only one government witness (Ewing), an accomplice and co-conspirator named in the indictment, who was not corroborated in any respect, and who gave the only testimony

against petitioner Teitelbaum and others on trial with him, the errors complained of were prejudicial as a matter of law, requiring that this conviction be reversed. This result would seem to follow all that has been said above concerning this mass conspiracy trial, with its loose application of the rules of evidence and other inherent prejudicial techniques, when applied to one in Teitelbaum's position. In *Grunewald* v. *United States*, *supra*, p. 404, this Court stated:

> "Prior cases in this Court have repeatedly warned that we will view with disfavor attempts to broaden the already pervasive and wide-sweeping nets of conspiracy prosecutions."

Then this Court cited the cases of *Delli Paoli* v. *United States*, 352 U. S. 232; *Lutwak* v. *United States*, *supra*; *Krulewitch* v. *United States*, *supra*, and *Bollenbach* v. *United States*, 326 U. S. 607, as typical of the cases it had in mind in this statement. Any comparison between this case and the ones cited will demonstrate clearly that this is by far the most grievous example of mass trial to come before this Court in many years.

Simple justice, then, requires review of this case, and the cases of all related petitioners in this trial, by certiorari.

CONCLUSION

For all the foregoing reasons, this petition for writ of certiorari to the United States Court of Appeals for the Second Circuit should be granted.

Respectfully Submitted

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Of Counsel

August 10, 1959

APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 214—October Term, 1958.

(Argued February 4, 1959 Decided June 15, 1959.)

Docket No. 25188

UNITED STATES OF AMERICA,

Appellee,

—v.—

HARRY STROMBERG, HENRY TEITELBAUM, JEAN ARON, NATHAN BEHRMAN, MARTIN DE SAVERIO, GEORGE BRISBOIS, HERMAN SAMNICK, BENJAMIN DANIS, SAUL SNYDER, SALVATORE MAIMONE, ANTHONY MIRRA, STEVE PUCO, DANIEL LESSA, NICHOLAS LESSA and LEO SETO,

Defendants-Appellants.

Before:

SWAN, *Circuit Judge,*

MADDEN, *Judge,* United States Court of Claims,*
and HINCKS, *Circuit Judge.*

Appeals from the United States District Court for the Southern District of New York, Irving R. Kaufman, *Judge.*

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* Sitting by designation pursuant to the provisions of 28 U. S. C. §291(a).

Appendix

SAMUEL MEZANSKY, New York, N. Y. (Moses Polakoff and Sheldon Lowe, New York, N. Y., on the brief), *for defendant-appellant Harry Stromberg.*

DANIEL H. GREENBERG, New York, N. Y. (Max Fruchtman, New York, N. Y., on the brief), *for defendant-appellant Henry Teitelbaum.*

JOSEPH LEARY DELANEY, New York, N. Y., *for defendants-appellants Jean Aron and Anthony Mirra.*

MAURICE EDELBAUM, New York, N. Y. (Chester E. Kleinberg, New York, N. Y., on the brief), *for defendant-appellant Nathan Behrman.*

FREDERICK B. BOYDEN, New York, N. Y., *for defendant-appellant Martin De Saverio.*

GEORGE FEIT, New York, N. Y., *for defendant-appellant George Brisbois.*

IRWIN KLEIN, New York, N. Y. (Albert H. Ruppar, New York, N. Y., on the brief), *for defendant-appellant Herman Samnick.*

HENRY K. CHAPMAN, New York, N. Y. (Murray E. Gottesman, New York, N. Y., on the brief), *for defendant-appellant Benjamin Danis.*

EDWARD H. LEVINE, New York, N. Y. (Vernon C. Rossner, New York, N. Y., on the brief), *for defendant-appellant Saul Snyder.*

Appendix

MOSES L. KOVE, New York, N. Y., *for defendant-appellant Salvatore Maimone.*

JAMES J. HANRAHAN, New York, N. Y., *for defendant-appellant Steve Puco.*

HENRY K. CHAPMAN, New York, N. Y., *for defendants-appeallants Daniel and Nicholas Lessa.*

MOSES POLAKOFF, New York, N. Y. (Samuel Mezansky, New York, N. Y., on the brief), *for defendant-appellant Leo Seto.*

GEORGE I. GORDON and MARK F. HUGHES, JR., Asst. U. S. Attys., Southern District of New York, New York, N. Y. (Arthur H. Christy, U. S. Atty., Herbert F. Roth, Kevin Thomas Duffy, Otis Pratt Pearsall, Alan W. Richenaker, and Gideon Cashman, Asst. U. S. Attys., S. D. N. Y., New York, N. Y., on the brief), *for the United States.*

HINCKS, *Circuit Judge*:

Fifteen defendants in this case appeal from judgments of convictions entered against them upon a jury verdict. The indictment, in a single count, charged forty-six defendants and sixteen others under 18 U. S. C. §371 with conspiring to violate 18 U. S. C. §212 (bribery of customs officials), 21 U. S. C. §§173, 174 (narcotics laws) and to

defraud the United States of its right to have the Customs Service administered free from corruption.

Before the trial, two defendants entered guilty pleas. The Government consented to the motions of three defendants for severance and itself moved for severance as to eleven more. Another eleven are fugitives from justice or unidentified. The remaining nineteen were tried together, although a number of them made timely motions for separate trial. The opinion of Judge Palmieri, 22 F. R. D. 513, deals in part with the severance motions, as well as with other pretrial motions. At the end of the Government's case, a judgment of acquittal was directed by the court in favor of one defendant. The jury returned verdicts of guilty against the other eighteen, and fifteen are now before us on appeal.[1]

At the trial, the Government's case depended principally upon the testimony of three witnesses. The first of these, one Lafitte, a Government employee and informer, testified to conversations with a number of the alleged conspirators during the first part of the conspiracy; the whole conspiracy, the indictment charged, continued from 1950 to 1956. In July, 1952, Lafitte met one Aron,[2] who ran several corporations and maintained offices in New York City. Through Aron, Lafitte met a number of the defendants named in the indictment: Gelb,[3] LaBonte,[3] Baruche,[3] and

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[1] One defendant, who received a suspended sentence, did not appeal; another died before his appeal could be heard; and on the appeal of a third, the Government confessed error.

[2] A defendant-appellant.

[3] A defendant, not on trial below.

Brisbois[2] whom Aron described as his Canadian representative. This group met frequently at lunch, dinners and at Aron's office; their conversations, according to Lafitte, frequently involved the narcotics trade. In one of these conversations, Gelb told Baruche he was paying too much for heroin in France. There was also discussion of a transaction "with the Boston people" in which $80,000 had been lost; it was generally agreed that a trip to Boston was necessary because the Boston people "would have to be straightened out." Also, the purchase of a coalyard in Boston was under consideration, through which narcotics might be smuggled. Finally, in November, 1952, Aron and Lafitte went to Boston with two others, not accused in the indictment: Gelb did not go because too closely identified with traffic in narcotics. In Boston, they met Brisbois, Moffie,[3] and Bucelli[4] and there was general discussion relating to the smuggling of narcotics. It appeared from the conversations that narcotics had already been smuggled through a Boston coalyard. The success of these further negotiations with the Boston group does not appear in the testimony. Shortly thereafter, however, Aron and Lafitte returned to New York. There, the social contacts between Lafitte and Baruche, Gelb and Aron continued. Upon one occasion, Lafitte met Behrman,[2] whose name figues largely in the alleged conspiracy in its later stages. He also testified that he met Samnick[2] and Danis,[2] Customs Inspectors, upon various occasions, in the company of Aron, Gelb and Baruche; and each made a remark about the ease of smuggling goods through Customs. Aron

[4] A defendant who died pending his appeal.

described Samnick to Lafitte as "one of his Customs men." And the active assistance of Customs Inspectors was used as a talking point by Baruche in attempting to persuade Lafitte to join them in the narcotics business. Lafitte chose to remain unpersuaded, however; and, after he had reported his findings to the Government, some time early in 1953, it was apparently thought advisable to let his contact with the Aron group lapse.

Several aspects of Lafitte's testimony were corroborated by minor witnesses not named as defendants. Montfiore testified of dealings with Aron frequently after 1949, at the time when Aron was engaged in importing resistors for television tubes; that in Aron's office, he frequently saw Gelb, Baruche, Danis and Samnick; and that Aron told him that the Customs Inspectors were useful to him in avoiding red tape in getting in resistors by air. He testified further that although Aron said, once, that he owed Samnick and Danis money, he never saw any money passed; but did once see a postdated check, which Aron said was for Samnick. Also that Aron had in 1952 or 1953 described a transaction between Gelb and Baruche in which "Gelb had taken $30,000 from Baruche," Aron remarking that he was "very glad he was out of it."

One Adatto, a nephew of Baruche's who worked for Aron, corroborated that fact that Samnick and Danis were often in Aron's office; he testified that he once sought Samnick's help to expedite te entry of some electronic material for Aron and that he once took part in transferring funds from Gelb and Aron to Baruche in Europe through several Swiss bank accounts.

Finally, one Brenner, Aron's secretary, testified to frequent visits at Aron's office by Gelb, Baruche, Sammick and Danis.

After the period covered by Lafitte's testimony, which described events up to the end of 1952, evidence of the conspiracy breaks off until the end of 1953, when James Ewing, the second major prosecution witness, appeared on the scene. Ewing, himself a dealer in narcotics in Detroit, began to buy narcotics in New York from Vellucci,[5] delivered to him by Tedesco.[5] In answer to a complaint that the narcotics supplied were overly diluted, Vellucci said, according to Ewing, that he was going to deal with the "mob around 50th and Broadway." Aron's office, at this time was at 49th St. Somewhat later, Ewing testified, Vellucci began to purchase from Behrman and Gelb, to whom Ewing was introduced. He testified to one purchase in which the money he paid Vellucci was passed directly on to Gelb.

In March, 1954, Gelb was arrested by Federal Narcotics Agents. Government agents testified to the discovery of huge amounts of narcotics in two apartments used by Gelb where there was also discovered a letter from Baruche to Gelb. And the landlord at one of the apartments testified that Behrman was a frequent caller. According to one witness, Behrman was also seen at Federal Detention Headquarters talking to Gelb, after Gelb's arrest; and there was evidence that a letter was passed, by another witness, from Behrman to Baruche.

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[5] A named coconspirator, not a defendant.

The arrest of Gelb and the seizure of the huge cache of narcotics, Ewing testified, made it necessary for Vellucci and Behrman to raise from another source at least $50,000 to pay for a shipment of narcotics shortly to arrive from France. Ewing testified that to meet this need they obtained the aid of Stromberg,[2] who advanced them money; that later repayments were made on several occasions, varying in amount from $10,000 to $25,000; that present at these meetings was Teitelbaum,[2] who was a constant companion of Stromberg; that the money obtained from Stromberg was delivered to "Gene's [Baruche's] partner's house"; that he, Ewing, accompanied the deliverer to 39 E. 78th Street, a building in which Aron's apartment was also located, and that after the shipment of narcotics arrived Stromberg was paid off, in installments. According to Ewing, Stromberg continued to finance the imports and once agreed to take steps to settle a jurisdictional dispute with another distribution ring; on one occasion in Ewing's presence money was paid by Vellucci to Teitelbaum for delivery to Stromberg; and after consultation with Stromberg and Vellucci, Behrman made the arrangements with Baruche, the European supplier, passing on to him complaints about the quality of narcotics, and, on one occasion, going to Europe himself.

Ewing testified that Vellucci told him, "We have Customs men paid off," and that Vellucci handled the distribution in New York. In the summer of 1954, Ewing's relationship with Vellucci became closer: while carrying on the distribution of narcotics in Detroit, through agents, he nonetheless managed to spend a great deal of time in New York. He began driving for Vellucci and was present at a number of

meetings with retailers, including De Saverio,[2] the Lessa brothers,[2] Puco,[2] Seto,[2] and Di Palermo,[3] at which orders were placed and cash, for earlier deliveries, was received. In June or July of 1955, Ewing met Baruche, who had come to the United States in answer to complaints that one shipment of heroin was bad. When the shipment was tested and found bad, in the presence of Vellucci and Behrman, Baruche agreed to bear the expense of replacement.[6] In August of 1955, Ewing was summoned to New York from Detroit by Vellucci; they drove to Hoboken, where they met a Customs Inspector, identified by Ewing as Snyder,[2] who delivered to them two suitcases. Vellucci told Ewing that the suitcases contained heroin; and shortly thereafter, Ewing was paid off for his help, in heroin.

Several aspects of Ewing's story were corroborated by other witnesses. Hart, a woman living with Ewing during the period, testified that she had received a number of deliveries of heroin from Tedesco, Vellucci's agent. And both she and Frank, a Detroit police officer in Ewing's pay, corroborated Ewing's account of a trip to New York and a meeting with Vellucci during which Vellucci showed Ewing how to test cocaine.

The last principal Government witness was one Basile, a narcotics retailer. His testimony related mainly to his source of supply, Di Palermo, whose business was operated in a candystore at 46 Prince Street. A Narcotics Agent testified that he had followed Vellucci and Behrman, in October, 1955, to the same address. Basile testified that he

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[6] It was shown that Baruche was registered at a New York hotel from July 22-29, 1955.

and his partners, Yacono[3] and Maimone,[2] had been supplied with both cocaine and heroin by Di Palermo; that one Greenberg[3] offered to introduce him to Behrman, who would sell him heroin for $7,500 a kilo, which was less than he was then paying Di Palermo; that when apprised of this competition, Di Palermo agreed to sell to him, Basile, for $7,000 a kilo, if Basile would buy in quantity, admitting that Behrman was his source. According to Basile this course of dealing continued without incident, except when a delivery of narcotics at about the beginning of September proved to be inferior. Di Palermo then told him "it's Natie Behrman's goods, it's got to be o.k." Somewhat later, Basile talked to Behrman and Vellucci, who said they had "got hit with a bad batch." On one occasion, Basile saw Di Palermo turn over money to Vellucci. Basile also implicated Mirra[2] and Paradise,[3] who regularly bought narcotics from him.

Upon this evidence, the Government maintains that a single conspiracy, as charged in the indictment, was properly found by the jury and that the convictions must be upheld. More specifically, it urges that Aron and Baruche, operating behind the facade of a legitimate importing business, were the central figures in a syndicate engaged in importing narcotics into this country. The Government maintains that Baruche served as the purchasing agent of narcotics in France throughout the life of the conspiracy; Samnick and Danis, working through Aron, assisted the combine in smuggling narcotics into the country through New York; Bucelli handled the Boston branch of the smuggling operation; Brisbois distributed narcotics through Canada; and Gelb financed the group's activities and

handled the New York distribution. This was the opening phase of the conspiracy which, the Government maintains, was established by the testimony of Lafitte. Subsequent importing and distributing operations were part of the same continuing conspiracy enlarged to include additional members. Thus, after Gelb's arrest, Stromberg became the financier and Vellucci and Behrman became the chiefs of the distributing apparatus. The testimony of Ewing and Basile, it is argued, ties in the other defendants as links in the conspiratorial chain in the later period.

The appellants' main defense consists of an attack on the Government's assertion that a single and continuing conspiracy was proved. They point to the time gap, between December, 1952, when Lafitte's testimony ends, and December, 1953, when Ewing's begins. In this contention, they rely principally upon *United States* v. *Russano*, 2 Cir., 257 F. 2d 712.

It is true that many of the actors in the group described by Lafitte are not seen again after December 1952: Brisbois, Bucelli, Samnick and Danis do not reappear, and the evidence connecting Aron to the later period is slight. The links mainly relied upon by the Government are Baruche, Gelb and Behrman. We think Behrman's one reported appearance at Aron's office is hardly strong enough to tie him to the conspiracy before 1953; but Baruche and Gelb were both central participants in each phase, until Gelb's arrest in early 1954. In *United States* v. *Russano, supra*, there was some positive evidence that the first conspiracy had ceased between 1952 and 1955, when the second com-

menced. We find no parallel evidence here: Gelb and Baruche's activities, central to both phases, were exactly the same after the gap in testimony as before, and no intervening change was shown. See *United States* v. *Liss*, 2 Cir., 137 F. 2d 995, cert. denied 320 U. S. 773. A conspiracy, once established, is presumed to continue until the contrary is shown. *United States* v. *Cohen*, 2 Cir., 145 F. 2d 82, cert. denied 323 U. S. 799; *Hyde* v. *United States*, 225 U. S. 347; *Poliafico* v. *United States*, 6 Cir., 237 F. 2d 97, cert. denied 352 U. S. 1025; *Marino* v. *United States*, 9 Cir., 91 F. 2d 691. We hold there was sufficient evidence to go to the jury as to the existence of a single continuing conspiracy.

This conclusion is not invalidated by the absence of evidence to show that some of the "New York members" of the alleged conspiracy, including the Customs officers, knew of the existence of the "Boston members" or their operations in Boston or Canada, and vice versa. For this is not the case of a "circle conspiracy"[7] such as was involved in *Kotteakos* v. *United States*, 328 U. S. 750, or of a single transaction such as in *United States* v. *Peoni*, 2 Cir., 100 F. 2d 401. Here the evidence plainly supported a "chain" type conspiracy[7] such as was involved in *Blumenthal* v. *United States*, 332 U. S. 539, 556-7; *United States* v. *Bruno*, 2 Cir., 105 F. 2d 921, reversed on other grounds, 308 U. S. 287; *United States* v. *Cohen, supra; United States* v. *Rich*, 2 Cir., 262 F. 2d 415; *United States* v. *Carminati*, 2 Cir., 247 F. 2d 640, cert. denied 355 U. S. 883; *United States* v. *Tramaglino*, 2 Cir., 197 F. 2d 928, cert. denied 344 U. S. 864.

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[7] 57 Columbia Law Rev. 387, 390.

For here there was evidence of a core of conspirators (Aron, Baruche and Gelb)[8] who were buying, importing, and distributing narcotics for sale in large quantities in successive transactions. As the cases above cited show, from such evidence it might rationally be inferred that one joining such a conspiracy knew that it had a scope and that, for its successful operation, it required a widespread organization, more comprehensive than may have been disclosed by any contact or transaction of which he had knowledge through his actual personal participation. Thus activities by Boston conspirators in Boston were not outside the scope of the conspiratorial agreement merely because not shown to have been specifically known to certain of the New York conspirators, and vice versa. Each defendant, once found to be a member whatever the level of his participation may have been, might be found intentionally to have contributed to the success of the overall conspiracy.

The appellants also contend that the convictions should be reversed because obtained in "a mass trial" in which so many defendants were involved that, especially in view of the complex issues and the volume of evidence received "subject to connection,"[9] the jury could not properly evaluate and apply the evidence to the individual defendants. Here too we disagree. In so holding, we do not rest upon

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[8] There was substantial evidence that after Gelb's arrest his functions in the conspiracy were taken over by Stromberg and Vellucci.

[9] Principally, evidence of the acts and declarations of alleged co-conspirators which according to the judge's ruling was not to be considered against a particular defendant unless he were found by independent evidence to be a member of the conspiracy.

the fact that the mere number of defendants on trial, or of alleged conspirators involved, was no greater than in other cases in which convictions have been affirmed, such as the *Bruno* and *Cohen* cases, cited above. *United States* v. *Falcone*, 2 Cir., 109 F. 2d 579, aff'd 311 U. S. 205. Nor do we think it determinative that no abuse of discretion was shown in denying below pretrial motions for severance. We place our holding squarely on the fact that, in the context of this trial, nothing in the issues, the evidence or the rulings warrants a conclusion that the number of the defendants prevented the jury from appraising the independent evidence against each defendant and meting out individual justice under the law.

Broadly viewed, the Government's case rested on the testimony of three witnesses, Lafitte, Ewing and Basile, whose credibility was vigorously assailed by the defendants. Surely it was not beyond the capacity of the jury to decide whether these witnesses were to be believed. And once it was determined that these witnesses were to be believed and that the acts and declarations of the defendants and their alleged coconspirators, to which these witnesses had testified, had indeed been made, we think it by no means a task of insuperable difficulty for the jury to comply with the judge's instructions[10] and determine as to each defendant the issue of membership in a single continuing conspiracy

[10] The judge charged:

"In your consideration, then, of the evidence you should first determine whether or not the conspiracy to import and distribute existed as charged in the indictment. If you conclude that such conspiracy did exist, you should next determine as to each defendant separately whether or not he or she was a party to or member of the conspiracy, with knowledge

on the basis of the independent evidence—i.e., the evidence as to his own acts and admissions.

There was nothing particularly complicated about the independent evidence which connected each defendant to the conspiracy. It's application involved the usual jury task of collating the separate items of independent evidence relating to each defendant and determining whether in sum

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of its illegal purpose and with the intention to assist the conspiracy to achieve its illegal objective.

"In considering whether or not a particular defendant was a member of the conspiracy, you must do so without regard to and independently of the statements or declarations of others. That is to say, you must determine the issue as to his or her membership in the conspiracy from his or her own statements or declarations or acts or conduct.

"If and when the existence of the conspiracy charged in the indictment and the membership or any or all of the defendants in such conspiracy has been found, then the acts done and the statements or declarations made by any person found by you to be a member of the conspiracy may be considered in connection with the case as to any defendant whom you find to have been a member of the conspiracy even though such acts and declarations may have been made in the absence and without the knowledge of such defendant, provided such acts were done and such statements or declarations were made during the continuance of such conspiracy and in furtherance of an objective or purpose of the conspiracy.

"So, if you conclude from the evidence that a defendant was a member of the conspiracy and you do so based upon the independent evidence, as I have already told you, based upon his own acts or her own acts or her declarations, or her or his conduct, you may then consider as if made by him or her any statements or declarations of other members of the conspiracy, even though they are not named as defendants in the indictment, provided such statements or declarations were made during the existence of the conspiracy and in furtherance of an object or purpose of the conspiracy as charged in the indictment."

total it warranted the inference of membership. To be sure, because of the number of the defendants and the exigencies of trial the several items of direct evidence relating to a particular defendant were interspersed throughout a record comprehensive enough to cover all. But even if it might have taxed the capacity of a jury single-handed, with memory of the evidence unrefreshed, to filter out and collate the several items of evidence relating to the connection of each defendant, this jury had the aid of a summary of such evidence given by the judge in his charge. Notwithstanding the number of defendants, we are confident that aided by the judge's charge the jury had in mind the evidence unconditionally received against each defendant which linked him with the conspiracy.

It is true, that in addition to the independent evidence of the acts and declarations of the individual defendants, there were before the jury, subject to connection, numerous incriminating hearsay declarations of coconspirators which under the judge's charge were competent only against such defendants as were found by the jury to be linked to the conspiracy by independent evidence and only if made in the furtherance of the conspiracy. The appellants contend that with so many defendants on trial the jury could not keep these two categories separate. But as Judge Hand pointed out in *United States* v. *Dennis*, 183 F. 2d 201, 230-231, aff'd on other grounds 341 U. S. 494, it was, at least under the preferred doctrine, a preliminary question for the judge to decide as to each defendant whether, if the Government's witnesses were believed, he and the various declarants were engaged in a common conspiracy which the declarations helped to realize: it was for the jury on all the evidence "to decide whether they believed the wit-

nesses beyond a reasonable doubt." In this view of the law, if the judge, taking the testimony of the Government witnesses as true, decides that a given declarant and a given defendant were engaged in a common conspiracy, which the declarations helped to realize, the declarations of the co-conspirators are left "to the jury to use like any other evidence • • •" And there is no need for the jury "to keep their minds in isolated compartments" as would be the case if the preliminary question were left to the jury. See also *Glasser* v. *United States*, 315 U. S. 60, 74; *United States* v. *Pugliese*, 2 Cir., 153 F. 2d 497; *United States* v. *Compagna*, 146 F. 2d 524, cert. denied 324 U. S. 867. Accordingly, once the judge by his denial of motions for judgments of acquittal made at the close of the Government's case had himself decided the preliminary question as to whether the declarations of coconspirators in the execution of the conspiracy had been connected under the rule of the *Dennis* and *Pugliese* cases, there was no need for the jury to keep the evidence of declarations conditionally received in "isolated compartments" of their minds.

Here, as Judge Hand suggested in his opinion in the *Dennis* case, the charge was overly favorable to the defendants. For the judge, by denying the motions for acquittal, himself decided as to each defendant the preliminary question of connection to the conspiracy by independent evidence.[10a] Yet he instructed the jury that only if it also de-

[10a] That the judge properly exercised his function in this respect is demonstrated by the judgment of acquittal of the defendant Lewis granted at the close of the Government's case. The judgment was granted on the express ground that there was insufficient independent evidence to connect Lewis with the conspiracy.

cided the preliminary question adversely to a defendant could it proceed to consideration of the ultimate issue of his guilt beyond a reasonable doubt on all the evidence. The error, since in favor of the defendants, is of course not ground for reversal.

Moreover, we must not lose sight of the fact that the difficulties which the appellants envisage stem from the number of conspirators rather than the number of defendants on trial. The same evidence would have been admissible similarly subject to connection and the same problems would have arisen if each of the appellants had been tried separately. In the one situation as in the other, the number of conspirators would have been the same. *United States* v. *Carminati, supra.* And of course conspirators are not entitled to immunity merely because their number is great. *United States* v. *Cohen, supra; Kotteakos* v. *United States, supra.* Indeed, broadly considered the large conspiracies are potentially more dangerous than the small ones.

The foregoing holdings, however, do not finally dispose of the objections of a number of the individual defendants that the evidence was insufficient to support a finding that each was a member of the conspiracy. Most of these objections are directed at the credibility of the principal Government witnesses. In so far as this is the case, they will be disregarded, for of course it is not the function of an appellate court to redetermine controverted issues already decided by the jury. *Cramer* v. *United States,* 325 U. S. 1; *United States* v. *Markman,* 2 Cir., 193 2d 574; *United States* v. *Compagna, supra; United States* v. *Manton,* 2 Cir., 107 F. 2d 834, cert. denied 309 U. S. 664. But it is

incumbent upon us to examine contentions that even if the Government witnesses are believed the independent evidence connecting each defendant with the conspiracy is insufficient to sustain his conviction. *Glasser* v. *United States, supra.*

As to the appellants Samnick and Danis, we are unable to find evidence which warranted submission to the jury. Much of the evidence relating to them was hearsay: Lafitte testified that Aron described each as one of his Customs men, but not in their presence; a check, drawn by Aron payable to cash was said by him to be for Samnick, again not in his presence. Each, to be sure, was frequently in Aron's office and was frequently entertained; and Samnick, upon at least one occasion, was called to expedite the entry of resistors for Aron's apparently legitimate importation business. But mere association with conspirators is insufficient basis for a finding of participation. *Di Re* v. *United States,* 332 U. S. 581; *Aikens* v. *United States,* D. C. Cir., 231 F. 2d 66; *United States* v. *Moloney,* 7 Cir., 200 F. 2d 344. The only proof which could possibly be considered independent evidence of participation consists of the statements, one by each of these two defendants, made to Lafitte.[11]. As to one of these statements, it is not clear that the subject-matter was narcotics rather than resistors. And each might not unreasonably be construed only as hypothetical comment: after all, there was no evidence

[11] In response to Lafitte's statement that big packages of narcotics were difficult to get through Customers, Samnick is reported to have said. "By boat or by plane the best way to do it is to use two big suitcases." Danis, upon another occasion, is reported to have said that "if he wanted, he can go with a truck across."

whatever that either Samnick or Danis had ever actually used the smuggling technique which they mentioned. It may seem strange that narcotics conspirators should discuss such techniques at luncheon with friends not members of the conspiracy. But no inference unfavorable to these defendants may be drawn from this fact: Lafitte's own testimony shows that they discussed their nefarious business with him knowing that he was not a coconspirator. As to these two defendants, the independent evidence was too slight to warrant the admission of hearsay declarations and too slight to submit to the jury. Their motions for a directed verdict should have been granted.

We also think that the conviction of the appellant Snyder must be reversed. At the trial, it was stipulated that Snyder had been introduced to either Aron or Baruche in 1949, before the conspiracy began. Aside from this, which standing alone was insufficient to support a conviction, the only incident connecting Snyder with the conspiracy is the delivery of two suitcases, later found to contain heroin, to Vellucci and Ewin in Hoboken.[12] In *United States* v. *Reina*, 2 Cir., 242 F. 2d 302, cert. denied *sub nom. Moccio* v. *United States*, 354 U. S. 913, we held that participation in a single isolated transaction was an insufficient basis upon which to bottom an inference of continuing participation in a conspiracy. For aught that appears in this record, this was Snyder's only transaction with the group; under

[12] Snyder's conviction rests upon the jury's acceptance of Ewing's identification of him and upon the jury's rejection of Snyder's very plausable alibi. But these are questions of fact, which, we have held, are not reviewable here. On the identification point, see *Zammar* v. *United States*, 8 Cir., 217 F. 2d 223.

the reasoning of the *Reina* case, the evidence is insufficient to support the inference that Snyder knew or accepted the conspiratorial aims or that his participation went beyond the single transaction.

The apppellants De Saverio and Seto also invoke the *Reina* decision. But the evidence against both of these appellants was not limited to a single transaction. As to De Saverio, Ewing testified to a conversation between De Saverio and Vellucci about the amount of money, $12,000, owed to Vellucci "for the balance of a kilo and part on a kilo that he had not paid for." Taking the conversation in context, we think that, in the light of the evidence of the amount of narcotics involved and the manner of payment, a jury might reasonably infer the two were discussing payment for more than a single sale and that both understood that the narcotics involved were bought for distribution at retail. Moreover, upon another occasion Ewing was present when De Saverio paid Vellucci money. This aspect of the case was fairly put to the jury by the trial judge's charge. And to Seto also, we think, the *Reina* decision is inapplicable. For Ewing testified to an order by Seto from Vellucci in the summer of 1954 and to a second order in May, 1955. And he described these as two of half a dozen transactions in all.

De Saverio also insists that it was error for the judge to refuse a charge as to evidence relating to his attempted impeachment of Ewing's testimony against him. Ewing had testified that the transactions between Vellucci and De Saverio took place in De Saverio's club in 1954 and on cross-examination he had described the layout and furnish-

ings of the club where the business between Vellucci and De Saverio was carried on. The defense called two former members of the club who testified to changes in the layout and furnishings made, they said, in the spring of 1955 and described the premises before and after the changes. Ewing's description, which purported to be that of the premises as existing in 1954, more nearly resembled, according to testimony of the defense witnesses, the premises as they were after the changes. To explain this apparent conflict the prosecutor on summation suggested that the conversations which implicated De Saverio might have occurred on a visit to the club in 1955 after the changes had been made, pointing out that there was no evidence that Ewing had not been there in 1955. To this the defense objected and, to bolster its attempt to impeach Ewing's testimony, De Saverio's counsel at the close of the Government's summations requested a charge that there was no evidence that Ewing had been in the club in 1955. It is the refusal so to charge that is now assigned as error. We think the claim of error is without substance. When the prosecutor's summation was interrupted by the objection, the judge said: "I don't think there was any evidence that they [Ewing and Vellucci] continued to go there [to De Saverio's club] in 1955." In his summary of the Government's case against De Saverio he called attention to Ewing's testimony that the visit to the club was in *1954*[13] and to the conflict between Ewing's testimony as to the visit

[13] Ewing placed the visit to De Saverio's club a week after his first meeting him in another bar. When asked as to the time of the first meeting, Ewing said: "I believe it was the summer of '53—'54." When pressed more closely he said: "The summer of 1954."

in 1954 and his description of the club as it then existed, on the one hand, and the testimony of the defense witnesses, on the other. He instructed the jury that they must acquit De Saverio if they did not believe Ewing's testimony. And he instructed generally that it was for the jury to determine what the testimony was, not from the assertions of counsel but from their own recollection. We think that the defendant's rights were sufficiently guarded and that the issue was properly submitted to the jury without the requested charge as to the absence of evidence of any post-1954 visit. See *United States* v. *Rosenberg*, 2 Cir., 195 F. 2d 583, 597-598, cert. denied 344 U. S. 838.

The appellant Teitelbaum also objects that there was insufficient evidence to connect him with the conspiracy. Ewing testified that Teitelbaum was always present, with Stromberg, when Vellucci and Behrman met Stromberg for the purpose of discussing the financing of narcotics shipments. However, several of these conversations neither Teitelbaum nor Ewing were able to hear, since they remained at the bar while the others discussed business around a table some distance away. Nevertheless, Teitelbaum was present, although not a participant, during at least two other conversations dealing with narcotics. From these, the jury might fairly believe that Teitelbaum knew of the common plan. And there was testimony that he delivered a payment from Vellucci to Stromberg upon one occasion and that at the same time he discussed the purposes of the conspiracy with Vellucci. As to Teitelbaum, we hold that the jury's conclusion was warranted.

Other appellants also contend that the evidence was insufficient to support their convictions. Except as to Samnick, Danis and Snyder, we overrule this claim of error. We have reviewed the evidence against each and conclude that the sufficiency of the Government's proof was so plain that further comment on this claim of error will serve no useful purpose. We turn therefore, to consider claims of specific error.

The appellant Behrman and several others ascribe prejudicial error based upon Ewing's response to a question upon cross-examination. Ewing was being questioned as to his failure to mention Behrman's name in his testimony before the grand jury. The cross-examiner was pressing for a direct answer; the witness replied that he was unable to give one without an explanation. The judge ruled that he might answer and then explain. The witness then said: "No, I didn't mention his name in there because at that time I was not dealing with Nathan Behrman. *At that time Nathan was in jail.*"

There can be no doubt that the testimony above italicized was inadmissible; and to Behrman at least, it was also prejudicial. However, the answer was unforeseeable: plainly it had not been induced by the prosecution. The judge immediately struck out the testimony and instructed the jury to disregard it, adding "You are to pay no attention to that remark in any way. You are to disregard it completely." And the incident was an isolated one during the course of a long trial. These considerations distinguish the case from *United States* v. *Tomaiolo*, 2 Cir., 249 F. 2d 683, at page 695, where reversal was based on an

accumulation of errors. We are of the opinion that in the setting of this case the prompt instruction to disregard the answer cured the error. *United States* v. *Giallo*, 2 Cir., 206 F. 2d 207, aff'd 346 U. S. 929; *United States* v. *Curzio*, 3 Cir., 179 F. 2d 380; see *United States* v. *Apuzzo*, 2 Cir., 245 F. 2d 416, cert. denied 355 U. S. 831.

As is not unusual in an appeal from a fiercely contested and important trial, numerous claims of error are based on the conduct of the prosecutor. First, we will consider the prejudice claimed to have resulted from a public speech made[14] by the United States Attorney after the trial had begun in which he expatiated on the menace of organized crime. The speech was reported in at least two newspapers; in the New York Herald Tribune, it occupied a prominent place on the editorial page. As reported, the speech dealt with two major crime syndicates operating in New York and Chicago, alleged to have millions of dollars at their disposal to encourage activities in "gambling, racketeering and other illicit traffic • • • "; it was suggested that the Mafia was the connecting link between the syndicates and that one of the objects for which their financial power was used was "to influence and buy elected public officials and law-enforcement agents." Later in the article, the Federal Bureau of Narcotics was mentioned among the federal enforcement agencies which constituted an "important element in this campaign against organized crime." No reference was made to this case or to any of the defendants.

[14] The speech was made on a prior invitation to address the alumni of a large law school.

We think it unfortunate and undesirable for the prosecutor to make such a speech while conducting an important criminal trial. The effect may be so to stimulate outside pressures on the jury, through press and radio publicity, that a defendant's right to a fair trial may be impaired. Such pressures, even when not induced by the prosecutor, have sometimes been held to constitute sufficient ground for a new trial. See *Delaney* v. *United States*, 1 Cir., 199 F. 2d 107. But the problem here is not to state the preferred rule of practice, but rather with the aid of hindsight to assess the effect of the act upon this particular jury. See *Delaney* v. *United States, supra; United States* v. *Allied Stevedoring Corp.*, 2 Cir., 241 F. 2d 925, cert. denied 353 U. S. 984. In this case, the trial judge, after determining that several of the jurors had seen the article, immediately admonished them to disregard it and not to discuss it with anyone so that "the trial does not become adulterated by anything outside which may affect the jury." Doubts have been expressed about the effectiveness of such judicial admonitions. See *United States* v. *Leviton*, 2 Cir., 193 F. 2d 848, 865-867; *United States* v. *Keegan*, 2 Cir., 141 F. 2d 248, reversed on other grounds 325 U. S. 478; *Delaney* v. *United States, supra.* However, the content of this article differed little from much contemporary writing in the press on the general subject of organized crime and law enforcement. Its tendency to create prejudice against any of the defendants then on trial was neither direct nor strong. *United States* v. *Allied Stevedoring Corp., supra.* Only the fact that this speech was made by the prosecutor gives any color at all to the claim of prejudice now raised. Because

the article contained comment about the bribery of law-enforcement agents, it may have had a more direct thrust against the Customs officers on trial below than against the other appellants. And for other reasons set forth above, we have held that the verdicts against them cannot stand. As to the other appellants, we conclude that the possibility of resulting prejudice, especially in view of the judge's admonition, was too remote to affect the fairness of the trial or the validity of the convictions. *United States* v. *Allied Stevedoring Corp., supra.* In *United States* v. *Postma,* 2 Cir., 242 F. 2d 488, cert. denied 354 U. S. 922, convictions were affirmed in spite of contemporary newspaper publicity distinctly more damaging to the defendants than the article involved in this case.

Many other complaints are made about the conduct of the United States Attorney during the course of the trial. Most of these relate to his summation. The appellants, relying upon *Berger* v. *United States,* 295 U. S. 78, and *United States* v. *Spangelet,* 2 Cir., 258 F. 2d 338, assert that the United States Attorney placed his own integrity in the scales to support the credibility of his witnesses and that he improperly stated that he would never engage in any unfair tactics. It is true that in *United States* v. *Spangelet, supra,* we reversed where the prosecutor supported the credibility of a government witness by the statement that he had never made a deal. This summation, however, is in a radically different posture, because of the charges made by defense counsel in their summation. These charges need not be detailed at length: there were statements that two Government employees had "framed"

the defendants; that the United States Attorney had no choice but to prosecute the defendants; and that he himself did not believe the prosecution witnesses. In replying to these charges, the United States Attorney was well within his rights. See *Lawn* v. *United States*, 355 U. S. 339, 359 n. 15, affirming *United States* v. *Giglio*, 2 Cir., 232 F. 2d 589; *Henderson* v. *United States*, 6 Cir., 218 F. 2d 14; *Malone* v. *United States*, 7 Cir., 94 F. 2d 281, cert. denied 304 U. S. 562.

However, one comment in the Government's summation we must hold to constitute error. In discussing the corroboration of the Government's witnesses, the United States Attorney remarked: "Even Brisbois, who had the courage to take the stand . . ." Objections were immediately and properly taken. The comment was improper because it indirectly called attention to the failure of other defendants to take the stand: it was tantamount to saying that certain of the defendants lacked the courage to take the stand. *Wilson* v. *United States*, 149 U. S. 60; *Rice* v. *United States*, 2 Cir., 35 F. 2d 689, cert. denied 281 U. S. 730; *Morrison* v. *United States*, 8 Cir., 6 F. 2d 809. Nevertheless, in the context of this long trial, we think the incident not so prejudicial as to require a new trial. Several of the defendants' counsel had already commented upon their clients' failure to take the stand and had informed the jury that no adverse inference was to be drawn therefrom. Furthermore, Brisbois' counsel had emphasized that his client had taken the stand. The damaging fact had therefore already been put before the jury by the defense. Cf. *United States* v. *Feinberg*, 2 Cir., 140 F. 2d 592, 595. Moreover, a clear instruction to the jury was included in

the judge's charge. This, we have held, may cure such error. *United States* v. *DeVasto*, 2 Cir., 52 F. 2d 26, cert. denied 284 U. S. 678; *United States* v. *Di Carlo*, 2 Cir., 64 F. 2d 15; see *Wilson* v. *United States*, *supra*.

We hold also that reversible error is not to be found in the prosecutor's remark, after Ewing was asked his address, "Don't be afraid to give it to us." The judge immediately reproved the prosecutor and admonished the jury that the remark was to be disregarded. *United States* v. *Achilli*, 7 Cir., 234 F. 2d 797, aff'd 353 U. S. 373. Indeed, we doubt that the jury would have perceived any prejudicial connotation in the remark were it not for the objections it evoked. And, lastly, the prosecutor's remark, upon summation, that Ewing was living under guard in a Brooklyn hotel was a fair response, we hold, to the defense contention that he was living off the fat of the land. That the remark carried a possible implication that the guard was for Ewing's protection may not have been perceived by the jury until raised by the defense. For it was known to the jury that Ewing was a convicted criminal awaiting sentence. Upon objection, however, the judge again gave the jury an appropriate admonition.

To support their attack on the conduct of the prosecutor, counsel cites *Handford* v. *United States*, 359 U. S. 120, in which the decision reported in 260 F. 2d 890 was reversed in a brief *Per Curiam* "[u]pon consideration of the entire record and the confession of error by the Solicitor General." Counsel have made available to us the Solicitor General's memorandum in response to Handford's petition for certiorari from which it appears that in the *Handford*

trial the prosecutor, in his summation, had wholly without warrant made a prejudicial reference to the defendant's financial affluence. There was no comparable comment made in the case at bar. The appellants complain of the following observation of the prosecutor: "I am not going to deal in generalities; I haven't got time. I have been allowed five hours to answer 15 hours of the most subtle argument, cleverly distorted pictures of parts of the case, by the most able criminal lawyers practicing before any bar of justice." We fail to understand how this passage, which merely returned the compliment which the defendants had paid to the skill of the prosecutor, can be thought to deserve the censure implicit in the *Handford Per Curiam*. This and the other passages which the appellants criticize we think constituted no more than fair and vigorous advocacy: it was argument called for in response to arguments made in the summations for the appellants.

We proceed now to a consideration of various miscellaneous claims of error. Relying upon a statement in *United States* v. *Aron*, 2 Cir., 239 F. 2d 857, appellants contend that the statements made by Aron to Lafitte were extrajudicial admissions, for which corroboration is required. *Opper* v. *United States*, 348 U. S. 84. We find that Lafitte's testimony below was corroborated in many particulars—the story of the Boston trip, for example, was supported by the testimony of Taylor. But we need not rest upon this to overrule this claim of error. For it is clear that in the context of this case of Aron's declarations cannot properly be classified as extrajudicial admissions. They were made during the life of the conspiracy and were not therefore admissions after the fact. See *Smith* v. *United*

States, 348 U. S. 147, 155; *Warszower* v. *United States*, 312 U. S. 342. They were in furtherance of the conspiracy, since, as Lafitte testified, Gelb, Baruche and Aron were seeking his participation. And they were not subject to those weaknesses which characterize admissions or confessions made under pressure of police investigation. *Smith* v. *United States, supra; United States* v. *Winston*, 4 Cir., 222 F. 2d 323. In short, they were not admissions for which corroboration is legally required.

The appellant Mirra contends that "in a mass trial such as here," he was entitled as of right to a charge that the Government's evidence against him through the testimony of Basile, a coconspirator, was uncorroborated; a charge explaining what uncorroborated testimony is; and a charge that uncorroborated testimony of an accomplice should be scrutinized with great caution. He cites no cases which support these contentions. The applicable law does not require the corroboration of accomplice testimony. *Caminetti* v. *United States*, 242 U. S. 470, 495; *United States* v. *Moran*, 2 Cir., 151 F. 2d 661, 167 A. L. R. 403; *United States* v. *Schwartz*, 2 Cir., 150 F. 2d 627, cert. denied 326 U. S. 757; *United States* v. *Quinn*, 2 Cir., 124 F. 2d 378; *United States* v. *Gallo*, 2 Cir., 123 F. 2d 229. Nor would omission of a charge about the necessary caution with which a jury should approach accomplice testimony necessarily constitute reversible error, although it is the better practice to give it. *Caminetti* v. *United States, supra; United States* v. *Wilson*, 2 Cir., 154 F. 2d 802, vacated for resentencing 328 U. S. 823; *Pittsburgh Plate Glass Co.* v. *United States*, 4 Cir., 260 F. 2d 397, cert. limited to another

question 358 U. S. 917; *United States* v. *Bucur*, 7 Cir., 194 F. 2d 297. Here, it is true that the Government's whole case against Mirra rested on the uncorroborated testimony of Basile, a coconspirator. But in his charge the judge pointed out that counsel for Mirra contended that Basile's testimony had been discredited and that there was some evidence of friction between Basile and Mirra. He charged explicitly that "if you do not believe the testimony of Basile concerning the defendant Mirra, then you must find Mirra not guilty." This was followed by comprehensive and lucid general instructions as to the tests of credibility. We find no error in Mirra's conviction.

The appellants also complain that they were denied access to a report to which they claim to have been entitled under the rule of *Jencks* v. *United States*, 353 U. S. 657. The "report" in question was a summary by a Government narcotics agent of interviews with the Government witness, Ewing, prepared partly from recollection and partly from contemporary jottings over a period of about eight months. The report was in the agent's language, not Ewing's, and it had never been shown to, or adopted by, Ewing. When these facts had been developed in a hearing, the judge after seeing the report sustained the Government's refusal to disclose this report to the defense[15] upon the ground that it was not "substantially verbatim" nor "recorded contemporaneously", and hence not within the purview of 18 U. S. C. A. §3500. The ruling was plainly right. The

[15] After Ewing's direct examination, the Government delivered to the defense 260 pages of his contemporaneously recorded and substantially verbatim statements as well as his grand jury testimony.

appellants, however, contend that to the extent that §3500 restricts the right of inspection under the *Jencks* rule it is unconstitutional. As to this, unless and until the Supreme Court rules otherwise we shall adhere to the position which we took in *United States* v. *Spangelet, supra; United States* v. *Palermo*, 2 Cir., 258 F. 2d 397, cert. granted 358 U. S. 905; and *United States* v. *Lev*, 2 Cir., 258 F. 2d 9, cert. granted 358 U. S. 903. We hold that the enactment of §3500 was a valid exercise of Congressional power.

It is also urged that the trial judge unduly limited the cross-examination of certain witnesses. The claimed errors relating to the cross-examination of Lafitte may be quickly disposed of. The first of these relates to the trial judge's refusal to allow inquiry as to Lafitte's address. See *Alford* v. *United States*, 282 U. S. 687. However, somewhat later he instructed the United States Attorney to turn the address over to the defendants, whereupon defense counsel specifically withdrew their request. Moreover, the cross-examination directed to Lafitte's background was so complete and searching that we think it would have been proper for the trial judge to decide that the subject of his credibility had been thoroughly explored and to call a halt to this aspect of the cross-examination. *Alford* v. *United States*, *supra*, at page 694; McCormick, Evidence (1954 ed.), page 56. The same rule is dispositive of the objections to certain matters relating to Ewing's testimony. Ewing had been convicted, by court martial, of desertion and of sodomy. The records of these convictions were introduced during his cross-examination. Upon Ewing's denial that he committed the homosexual act and his assertion that he could not re-

member whether any witnesses had testified against him, the defense sought to introduce the transcript of the court-martial proceedings. This it was not permitted to do. The evidence was asserted to be relevant to impeach credibility. But the particular matter involved went far beyond establishing a criminal conviction. It was a collateral matter, and we think the trial judge wisely exercised his discretion in excluding it. *United States* v. *Tomaiolo, supra; United States* v. *Miller,* 2 Cir., 246 F. 2d 486, cert. denied 355 U. S. 905. The cross-examination of Ewing which lasted for seven days was mostly devoted to attempted impeachment. Plain common sense precludes a holding that the inquiry was unduly restricted.

We have considered all other questions raised by the appellants and conclude that they lack sufficient merit to warrant further discussion.

The court extends its thanks to Messrs. Boyden, Delaney, and Polakoff for their exceedingly able representation of the appellants De Saverio, Aron and Seto as assigned counsel in this long and involved appeal.

For reasons already stated, the convictions of Samnick, Danis and Snyder are reversed and remanded with directions to dismiss. *Yates* v. *United States,* 354 U. S. 298; *Bryan* v. *United States,* 338 U. S. 552; *United States* v. *Silverman,* 2 Cir., 248 F. 2d 671, cert. denied 355 U. S. 942. The convictions of all the other appellants are affirmed.